

Vol. 15 ST

In the Supreme Court of the United States

OCTOBER TERM, 1922

No. [REDACTED] ~~106~~ 14

**WILLIAM T. PRICE and ORA PRICE, Plaintiffs in
Error,**

vs.

**MAGNOLIA PETROLEUM COMPANY, a Joint Stock
Association; JOHN SEALY, E. R. BROWN, B.
WAVERLY SMITH, E. E. PLUMLY and W. C.
PROCTOR, Trustees; State of Oklahoma, Ex Rel.
Commissioners of the Land Office of the State of Ok-
lahoma, and Ex Rel. GEORGE F. SHORT, Attorney
General of the State of Oklahoma, Defendants in
Error.**

MOTION TO DISMISS WRIT OF ERROR AND TO AFFIRM JUDGMENT

BRIEF AND ARGUMENT IN SUPPORT OF MOTION

Geo. F. SHORT,
Attorney General of Oklahoma.

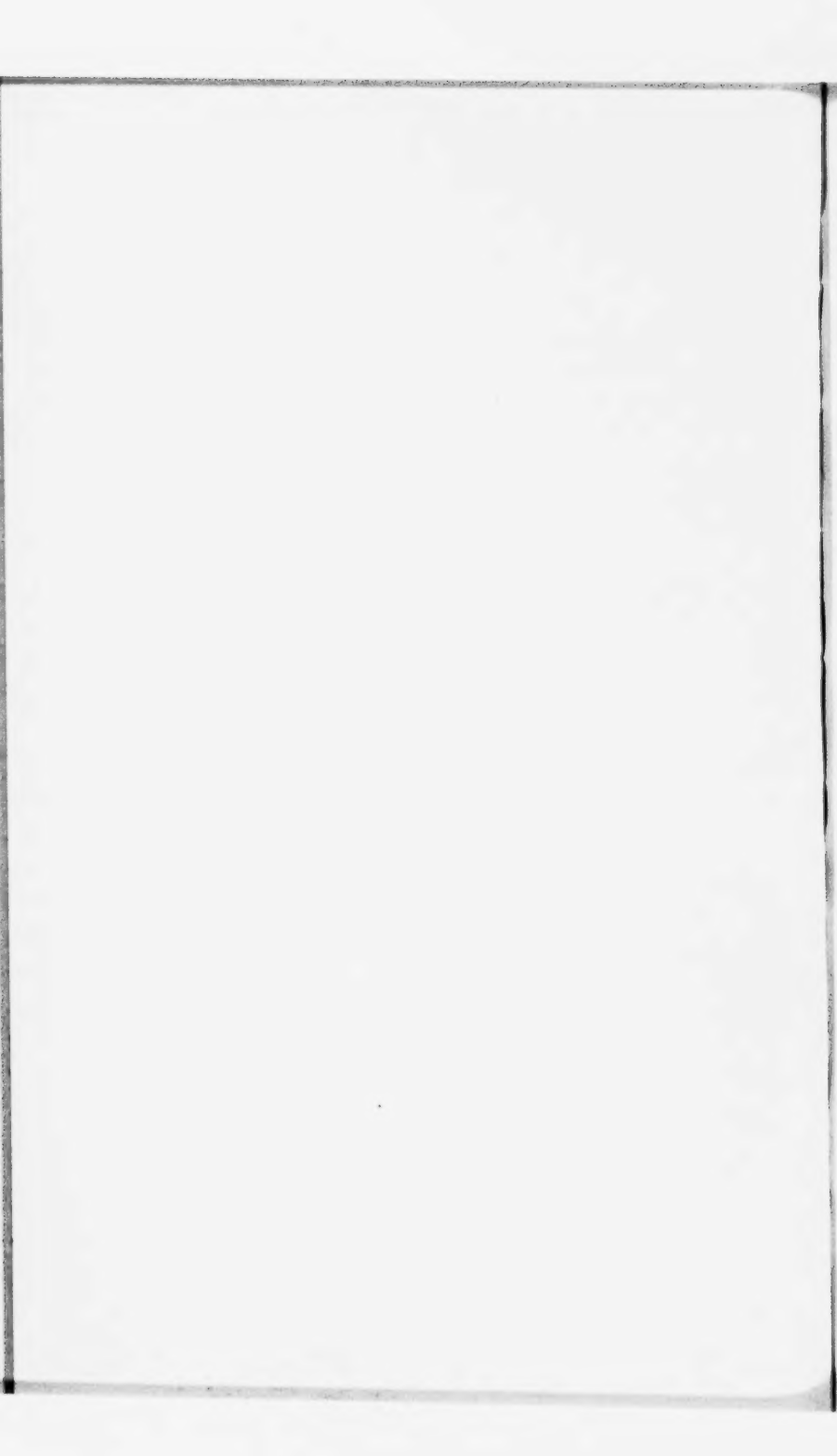
O. W. KING,
Asst. Atty., General.

Geo. E. MERRITT,
Attorney for the Commissioners of the Land Office.

W. H. FRANKE,
& B. B. BLAKENY,
Attorney and Solicitor for the Magnolia Petroleum Co.

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In the Supreme Court of the United States

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No. 546

WILLIAM T. PRICE and ORA PRICE, *Plaintiffs in
Error,*

vs.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock
Association; JOHN SEALY, E. R. BROWN, R.
WAVERLY SMITH, E. E. PLUMLY and W. C.
PROCTOR, Trustees; State of Oklahoma, Ex Rel.
Commissioners of the Land Office of the State of Ok-
lahoma, and Ex Rel. GEORGE F. SHORT, Attorney
General of the State of Oklahoma, *Defendants in
Error.*

MOTION TO DISMISS WRIT OF ERROR AND TO AFFIRM JUDGMENT

Now come the Magnolia Petroleum Company and its
Trustees, John Sealy, E. R. Brown, R. Waverly Smith,
E. E. Plumly and W. C. Proctor; and the State of Ok-
lahoma upon relation of the Commissioners of the Land

Office; and George F. Short, Attorney General of the State of Oklahoma, defendants in error and respondents, by B. B. Blakeney and George F. Short, Attorney General of Oklahoma, counsel for said defendants in error and respondents, and move to dismiss with costs writ of error and the appeal taken herein by the above named William T. Price and Ora Price, plaintiffs in error and to affirm the judgment upon the ground that this Court has no jurisdiction of the same and because the said writ of error and the said appeal is otherwise informal irregular and insufficient as shown upon the face of the record filed herein, and more particularly upon the grounds and for the reasons following, to-wit:

First: That on the 21st day of March A. D. 1922, as shown by the record in this Court, the Supreme Court of Oklahoma entered an order and judgment perpetually enjoining William T. Price and Ora Price from interfering with the operations of an oil and gas lease held by Magnolia Petroleum Company, and John Sealy, E. R. Brown, R. Waverly Smith, E. E. Plumly and W. C. Proctor, its Trustees, and from interfering with the State of Oklahoma to the royalties under said lease for oil and gas produced as shown by the printed transcript of record at page 186, and that the said land so leased was the Northeast Quarter of Section Thirty-Three (33), Township One (1) South, Range Eight (8) West, in the State of Oklahoma, being a part of the lands granted to the State of Oklahoma under the provisions of the Act of Congress June 16, 1906, 34 Statutes at Large, pages 267. 273.

That the claim of the plaintiffs in error, that the said decision of the Supreme Court of the State of Oklahoma was in conflict with the provisions of the said Act of Congress of June 16, 1906, and with the Constitution of the

United States, Sec. 10, Art. 1, and amendment thereto, and that the State of Oklahoma by and through the provisions of its Statutes as construed by the said Supreme Court of Oklahoma, assume and seek to deprive the plaintiffs in error of property, title, and all rights, privileges and immunities secured to the citizens of the United States, and of said State, and deprive the plaintiffs in error of their liberty and property without due process of law, and attempting to deprive and deny the plaintiffs in error of equal protection of the laws and to impair the contract of the said plaintiffs in error as alleged in the assignments of error from one to twenty-three, inclusive, found in the record commencing at page 203 and continuing to page 213, inclusive, present no Federal questions because the said purported Federal question presented is purely fictitious, one devoid of merit, does not reasonably involve the validity of any provision of any Act of Congress or of any of the laws of said State of Oklahoma, or reasonably require or involve the construction of the Constitution of the United States or any of its amendments or any Act of Congress, and does not present any question, of which this court has jurisdiction.

Second: That the said contentions of the said plaintiffs in error fail to show that they have any reasonable claim or title to any property involved in said controversy which would authorize or justify them in presenting or raising any question involving the validity or construction of the Constitution of the United States or any Act of Congress, or in any wise presenting any Federal question to this Court.

WHEREFORE, the defendants in error and respondents pray this Honorable Court that the said proceeding and

writ of error be dismissed and the judgment of the Supreme Court of the State of Oklahoma Affirmed.

GEO. F. SHORT, C. W. KING and GEO. E. MERRITT,

*Attorneys and Counsel for the State of
Oklahoma.*

-- W. H. FRANCIS and B. B. BLAKENEY,
*Attorneys and Counsel for Magnolia
Petroleum Company.*

In the Supreme Court of the United States

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vs.

MAGNOLIA PETROLEUM COMPANY, a Joint Stock
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Commissioners of the Land Office of the State of Ok-
lahoma, and Ex Rel. GEORGE F. SHORT, Attorney
General of the State of Oklahoma, *Defendants in
Error.*

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

The motion to dismiss this appeal or writ of error involves an analysis of the decision of the Supreme Court of the State of Oklahoma and the Act of Congress June

16, 1906, 34 Statutes at Large, page 267, and the rights, title and interest of the plaintiffs in error to the lands in controversy. But little difficulty ought to be encountered from an analysis of the decision and the Acts of Congress in determining just the rights of the plaintiffs in error to the lands in controversy.

Sec. 8 of the Act of June 16, 1906, known as the Enabling Act, provides, among other things:

“That Section Thirty-Three and all lands heretofore selected in lieu thereof, heretofore reserved under said proclamation, and Act for charitable and penal institutions and public buildings, shall be apportioned and disposed of as the Legislature of said State may prescribe.”

This section of course gave plenary power to the State, and any disposition of the land or any apportionment of its proceeds would be beyond the reviewing power of the Federal Government. This clause was followed, however, by the following additional legislation:

“Where any part of the lands granted by this Act to the State of Oklahoma are valuable for minerals, gas and oil, such lands shall not be sold by the State prior to January first nineteen hundred and fifteen; but the same may be leased for periods not exceeding five years by the State officers duly authorized for that purpose, such leasing to be made by public competition after not less than thirty days advertisement in the manner to be prescribed by law, and all such leasing shall be done under sealed bids and awarded to the highest responsible bidder. The leasing shall require and the advertisement shall specify in each case a fixed royalty to be paid by the successful bidder, in addition to any bonus offered for the lease, and all proceeds from leases shall be covered into the fund to which that shall properly belong, and no transfer or assignment of any lease

shall be valid or confer any right in the assignee without the consent of the proper State authorities in writing: Provided, however, that agricultural lessees in possession of such lands shall be reimbursed by the mining lessees for all damages done to said agricultural lessees' interest therein by reason of such mining operations. The Legislature of the State may prescribe additional legislation governing such leases not in conflict herewith."

The above clause necessarily constitutes a limitation upon the power of the State of dispose of Sec. 33 prior to the first day of January, 1915, in case that any of such lands are valuable for minerals, gas, or oil. As no sale was made of this land prior to January 1, 1915, and no mineral lease was made under the provisions of the clause in Sec. 8, above quoted, the construction of this clause is therefore not involved, though we may later give an analysis of some of its provisions for the purpose of assisting in the construction of other sections of the Act.

Sec. 10, of the Enabling Act Provides:

"That said sections thirteen and thirty-three aforesaid, if sold, may be appraised and sold at public sale, in one hundred and sixty acre tracts or less, under such rules and regulations as the Legislature of said State may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale, but such lands may be leased for periods of not more than five years, under such rules and regulations as the Legislature shall prescribe, and until such time as the Legislature shall prescribe such rules these and all other lands granted to the State shall be leased under existing rules and regulations, and shall not be subject to homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed but shall be reserved for designated purposes only, and until such time as the Legislature shall prescribe as aforesaid such lands shall be leased under exist-

ing rules: Provided. That before any of said land shall be sold, as provided in sections nine and ten of this Act, the said lands and improvements thereon shall be appraised by three disinterested appraisers, who shall be non-residents of the county wherein the land is situated, to be designated as the Legislature of said State shall prescribe, and the said appraisers shall make a true appraisalment of said lands at the actual cash value thereof, exclusive of improvements, and shall separately appraise all permanent improvements thereof at their fair and reasonable value, and in case the leaseholder does not become the purchaser, the purchaser at said sale shall, under such rules and regulations as the Legislature may prescribe, pay to or for the leaseholder the appraised value of said improvements and to the State the amount bid for the said lands, exclusive of the appraised value of improvements; and at said sale no bid for any tract at less than the appraisalment thereof shall be accepted."

An understanding of the provisions of this Act determines the rights of the parties to this controversy. This section provides that the State may at its pleasure sell section thirteen and thirty-three, but that if sold such land shall be appraised and sold at public sale in 160 acre tracts or less, under such rules and regulations as the Legislature of the said State may prescribe. Preference right to purchase at said sale is given to the lessee. There are other provisions in the section relating to the leasing of the land for a period not exceeding five year. This section also provides for appraisements both of the lands and of the improvements, and requires that in case the leaseholder does not purchase the land, that he shall receive payment for his improvements, and concludes with the provision that at said sale no bid for any tract less than the appraisalment thereof shall be accepted. The provisions of this section are so clear that ex-

tended refinements furnish no assistance to its interpretation.

Under these statutes the agricultural lessee is given no interest in the land and no title or vested right of any kind or character is given to the lessee. The State is not required to sell the land, and until the State sells it, the preference right to buy never comes into operation. The State is not required to lease it and the lessee is given no right to a lease upon the tract of land. The Act of Congress merely limits the right of the State in providing that if it is sold, it must be sold at public sale in tracts containing not more than 160 acres, for not less than the appraised value, and the lessee is given the preference right to buy at such sale. Or, if the State desires to lease the same it shall be leased for a period not exceeding five years under the rules and regulations to be prescribed by the State.

Thus we have four limitations upon the sale, if the State shall elect to sell; first, that if sold the sale must be at public sale; second, that the sale must be in tracts not exceeding 160 acres; third, that it must not be sold for less than the appraised value; and fourth, the lessee shall be given the preference right to buy. Until a sale is made, however, none of its provisions or limitations are made applicable. No sale having ever been made of the land in controversy, none of its limitations have ever come into operation, and no controversy can now be raised or presented as to the proper interpretation of them.

The next provision of Sec. 10, so far as applicable to any controversy now being presented, provides that the land shall be leased by the State under existing rules and regulations until other rules and regulations may be

adopted by the Legislature. The pertinent clause with reference to leasing is as follows:

“But such land may be leased for a period of not more than five years under such rules and regulations as the Legislature shall prescribe * * * but shall be reserved for designated purposes only, and until such time as the Legislature may prescribe as aforesaid, such lands shall be leased under existing rules.”

This clause gave the State permission to lease the lands and conferred upon the State the power to make any rule and regulation with reference to their leasing. It did not require that the same should be leased, and did not in any form restrict the power of the State to make any rule it desired with reference to leasing the same.

On the 2nd day of January, 1913, as shown by pages 20, 21, 22 and 23 of the record, the State of Oklahoma, by its Commissioners of the Land Office, executed an agricultural lease to W. T. Price for the tract of land in controversy, which provided that the State of Oklahoma, “hereby lease and let unto the party of the second part the following described tract of land.” This lease further provided: “This lease is made subject to the rights of the State of Oklahoma to sell and convey the land herein described at any time, and that upon such sale, if any be provided by law prior to the expiration of this lease, the same shall thereupon expire.” The lease also provided as follows:

“The said party of the second part hereby agrees, binds and obligates himself that he will not cut or remove, or permit to be cut or removed any timber from said land, that he will not quarry or remove, or permit to be quarried or removed, any building or valuable stone, from said land, that he will not mine or move or permit to be mined or moved any minerals therefrom, and that he will not

remove or take from said land any sand or gravel or other deposits of like character without first obtaining written authority so to do as by the laws of said state provided. The said party of the second part hereby agrees, binds and obligates, that he is leasing said land for agricultural and grazing purposes and that he will use and occupy the same for no other purposes and that he will care for and cultivate the same in a husbandlike manner and that he will protect said land from waste and that he will not permit or suffer any waste or trespass to be committed on or against said land."

This lease was extended by an extension certificate found at pages 24 and 25 of the record, and subsequently Price was permitted to hold over and enjoy the benefits granted by the lease. No reasonable contention can be raised that Price had or possessed any right, title, claim or interest in and to the tract of land in controversy except the right to use the said lands for agricultural and **grazing purposes** and the right to renew the lease in case the State desired to continue the leasing of the property. Whether or not the State had the right to lease the land for mineral purposes, and whether or not the provisions of the State law with reference to the leasing of lands for mineral purposes was regularly executed by the Commissioners of the Land Office, are matters that do not concern the plaintiffs in error, and does not justify an appeal to this Court.

If the State, exercising its power as a patentee of this land, did not desire to sell the same, the Acts of Congress in no way required such sale and attempted in no other manner to give to the lessee, Price, any right, claim or interest in the tract of land in controversy. The State might lease it, but whether or not the State did lease it was not a matter which concerned the Federal Government as a patentor, nor did the manner which the State

leased the land if for a term less than five years in any manner concern the Federal Government and the Legislative Acts authorizing the lease, and the manner in which said acts were executed is in no sense subject to the review of this Court as a Federal question.

The claim that Price having taken this land under an express contract that he should use and occupy the land for agricultural and grazing purposes, and for no other purposes, involves violation of the Constitution or its amendments, or the validity or construction of any Act of Congress, is utterly void of all merit and will not be considered in this Court. Price having no right to any mineral in the land could not in any way interfere with the rights of the owner of the land to enjoy the privilege of operating such mines, except so far as such operation might interfere with his agricultural and grazing lease. The Act of the Legislature expressly protected his agricultural and grazing interest, and the decision reserved to Price the full protection of such interest. In fact, assignment Number Seven, as well as other assignments, affirms the protection given by the decision for the damages done to the agricultural and leasing interests of Price, the lessee.

It is true that paragraphs eight and nine of the assignment of errors, intimate that the leasing of the land for mineral purposes was a sale of the land under the provisions of the Enabling Act. Paragraph eight (p. 206 of Rec.), so far as pertinent, reads as follows:

“The court erred in holding and deciding that the defendants in error (in the court below), William T. Price and Ora Price, had not the preference right to buy said land, in its entirety, under the grant of such right in and to said land so conditioned by the Act of Congress of June 16, 1906,” etc.

Paragraph nine alleges :

“The court erred in holding and deciding that the defendants below, William T. Price and Ora Price, defendants in error, had not the preference right to buy said land, and all thereof,” etc.

These assignments are so indefinite that they would probably be ignored. No contention was made in either of the lower courts that Price had the right to assert a preference right to a mineral lease, and it is probably not intended to be raised in this Court. The fair construction of the words, “in its entirety,” “and all thereof” found in these two assignments, is that having leased 160 acres he would at a sale be entitled to buy the whole of the 160 acres. We, however, have no objection to treating the assignments as covering the contention that Price had the right to purchase the mineral rights for the highest bid, because such contention is not presented by the record and is not reasonable under the interpretation of the Acts of Congress.

The State laws in providing the manner in which the preference right should be exercised required that the agricultural lessee, shall exercise his election to take such land at the highest bid immediately after the close of the sale, and that unless he did so elect he should forever be precluded from asserting any preference right to the land. (Sec. 7158 of Revised Laws of Okla., 1910). If it were admitted (which we expressly deny) that a mineral leasing was a sale in contemplation of Sec. 10 of the Enabling Act, Price would have to exercise that preference right, and not having exercised it would be held to have forever waived the same, and would now have no claim to the land. Price's answer does not claim that he has ever attempted to exercise his preference right or that he

now wants to exercise it, so far as the same affects the mineral lease.

The mineral lease was executed in 1919, after a public sale, in which the Magnolia Petroleum Company bid \$8,000 and at no place and at no time has Price ever attempted to exercise any preference right to acquire the mineral rights purchased by the Magnolia Petroleum Company. His contention has always been that he owned the land and that the State had no oil or gas to sell, and and that there was none for him to buy. Therefore, we might assert that if it is intended by these two assignments to claim a preference right to the mineral lease, there has been no attempt to exercise such preference right and now no claim can be made under such right.

However, Price had no preference right to take the mineral lease at the highest bid. The words, "if sold" and the terms found in Sec. 10, providing for the sale of the land, did not apply to the granting, assigning, conveying or leasing of the minerals in the land. The words, "if sold" and "when sold," found in this section referred to a sale of the fee of the land and not to the mineral leasing of the land. A mere inspection of the section and the application of legal principles to this section alone, would show that this is the proper view to be taken. But all question of doubt is removed by the consideration of the last paragraph of Sec. 8. This paragraph provides that the land shall not be sold, and then provides at some length that the same might be leased for mineral purposes, and thereby conclusively showing that the provisions authorizing or restricting the sale of the land in no way affected the right to lease or withhold the lease for mineral purposes.

Kennamer v. Midland Oil & Drilling Co.,
(CCA) 229 Fed. 872.

The effect of this paragraph is to make a severance of the oil and gas rights from the surface or corpus of the land.

There has been no serious contention on behalf of the plaintiffs in error that these acts of Congress gave any title to the land in controversy to the lessee. An examination of the opinion of the Supreme Court of the State and the several Acts of Congress referred to in this opinion, conclusively show that the absolute fee simple title became vested in the State. An analysis of these several Acts is found commencing at page 175 of the record. The Court has placed in italics in this opinion, the clause found in the Organic Act creating the Territory of Oklahoma, being Sec. 18 of the Act of Congress approved May 2, 1890, 26 Stat. L. p. 81, which is as follows: (See Rec. page 175.)

"Are hereby reserved for the purpose of being applied to public schools in the state or states hereafter to be erected out of the same."

The same idea was carried through all of the subsequent grants. The Supreme Court of the State in discussing the provisions of Sec. 10 of the Enabling Act, which permitted a sale by the State of Sections Thirteen and Thirty-Three, speak as follows:

"But said grant provided that such lands, 'if sold,' should extend a preference right to the lessee in possession, 'at the time of the sale,' to purchase at the highest bid. This is the only obligation imposed on the State as to the sale, except that under the proviso in section ten, if such lands should be sold at all, then the lands and improvements should be appraised in a certain manner, and the very fact that said section provides that in case the lessee does not become the purchaser, he shall be

paid the appraised value of his improvements, shows that Congress had no thought of granting to the lessee the absolute right to purchase, a right which he could enforce against the State whether the State chose to sell the land or not."

Further on in the opinion the Supreme Court of Oklahoma stated:

"The State now has complete control of such lands to lease or not to lease if it so chooses; to sell or not to sell if it so chooses. Should it sell any of them or lease any of them, such sale or lease must not violate the conditions of the grant."

The remainder of the opinion by the Court deals with the rights of the lessee under the laws of the State. It is held that under the laws of the State the Commissioners of the Land office ought not to have sold the property; that the Commissioners of the Land Office had properly segregated it as provided by the laws of the State. Whether the Court was right in this construction is not a question open in this Court. It was merely a construction of the different provisions of the Acts of the Legislature of Oklahoma, and the construction so given will be accepted as conclusive in the Federal Courts. This construction, however, is so obvious that but little can be gainsaid.

We then have a construction of the Act of Congress which places the fee title in the State of all the lands embraced by the several grants of Congress, with the privilege of selling certain portion of the land prior to January 1, 1915, and all of the lands after January 1, 1915. Or, a prohibition of the sale of any and all of said lands that were mineral in character but with the right to lease the mineral lands prior to January 1, 1915, in a particular designated manner, and a leasing of all of

the lands after January 1, 1915, in any form which the State might desire, subject to the condition that a lease for agricultural purpose should be for a period not exceeding five years. A lease of the tract of land to the plaintiffs in error for agricultural and grazing purposes, with the reservation of the right to mine the same, gives to these plaintiffs in error no right to inquire into the question of whether or not the State properly administered its estate in the minerals.

Provisions having been amply made to reimburse the agricultural lessee for the damage to his agricultural lease, he was not concerned as to the manner of disposal of the mining interest. He could raise no question, either Federal or State, regarding the disposition of the mining interest. His rights are so obviously restricted to the agricultural interest, that his attempt to raise a question regarding the disposition of the mineral interest is wholly without merit.

The plaintiffs in error did in the court below, present at great length their contention that the agricultural lessee had in equity become vested with the title because the officers of the State had not put the land up for sale and had erroneously attempted to segregate it. In his assignments of error he carries out this view by copying and italicising the expression that the Commissioners, "duly segregated such land in question from sale because of the oil and gas *supposed* to exist therein," and then alleges that the laws of Oklahoma, "did not confer plenary power or authorize segregation of said land on 'supposition,' and did not authorize the arbitrary and whimsical discrimination practiced against defendants in error; and because the said statutes of Oklahoma did not provide for a hearing to determine whether or not the lands of defendants in error was mineral

lands or 'supposed' to contain mineral within the contemplation of said Statute."

The above excerpts are found in Assignment Fourteen, pages 208 and 209 of the record. The State Court, however, held that the law did grant to the Commissioners of the Land Office the authority, and made it their duty to segregate the land when they had reason to believe the same valuable for mineral, and that if they supposed or believed it valuable, that they would have been guilty of the violation of their duties if they neglected to so segregate. These, however, are constructions of the State law, and the decision of the Supreme Court of the State is final. Whether the State properly segregated the land or not, is immaterial to Price because Price had no interest in the land. The Supreme Court of the State (p. 185 of Rec.) used this language:

"But the State has not sold it and the lessee has not purchased it, and until the land is sold and purchased by the lessee and fee simple title conveyed to the lessee, such lessee has no right to the oil and gas or other minerals therein."

A clear statement of the issues in controversy may be made as follows: The Act of Congress gave the title to the State and permitted the lessee in possession at the time of the sale to take the land at the highest bid. The State never sold the land and the lessee never took any interest in the land. The State could not give it to the lessee without a public sale because the Act of Congress required that the land should be sold at public sale for not less than the appraised value, and the State was without power to in any way give any of the title to Price without such a sale. Price, however, says that the State ought to have sold the land and therefore he has title notwithstanding the Act of Congress says the state

cannot give the title without a public sale. His complaint, therefore, is directed not at the violation of any Act of Congress, but the violation of the duty which he claims was imposed by the laws of the State. The Supreme Court of the State has decided that there was no violation of any of the laws of the State and no duty imposed to sell on the officers in charge of the public lands. Therefore, no Federal question can in any sense be presented.

We think the question might be disposed of by this discussion, but we will examine the assignments of error further for the purpose of ascertaining whether the decision of the Court in this case in any way deprived the plaintiffs in error of their liberty and property without due process of law and without compensation as referred to in a part of such assignments, and particularly Assignments Sixteen and Seventeen.

The method by which Price has attempted to urge his claim to a vested right is rather attenuated. He claims that under the provisions of paragraph eight of the rules originally issued (Rec. p. 134), he became vested with some interest in the land. This provision reads as follows:

"In case a new lease is to be made at the end of the third year, the preference shall be given the former lessee, if the Governor finds that he cultivated the land in a business-like manner and fulfilled the term of the lease in good faith."

This rule, in principle, was carried through the Legislation of the State and was practically the rule governing the leasing of property for agricultural purposes at the time this land was leased to Price.

To assert, however, that this provision would give

a vested right, would make a vested right or interest an intangible or flimsy thing. In the first place, the rule provides that *in case a new lease is to be made the preference shall be given to the former lessee*. The State was not required to make the lease and therefore the lessee was not entitled absolutely to such lease. In addition it provided that it should not be made to the lessee unless the Governor should find that he had cultivated the land in a business-like manner and fulfilled the terms of the lease in good faith. There is no pretense in this case that the Governor made any such findings, or that he had in good faith fulfilled the terms of the lease. We do not, however, desire to enter into any controversy regarding the facts because under no possible theory could it be contended that he was entitled to any vested interest, when the very provision giving the right to release authorized the divesting of such interest by merely refusing to lease.

Sec. 7195 of Rev. Laws of Okla. 1910, provides expressly that the land should be segregated if the Commissioners deemed the same valuable for oil and gas, and that such finding that the same was valuable should be entered of record, and then stating, "and such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this article."

Sec. 7196 of the said Rev. Laws of 1910, reads as follows:

"Each agricultural, timber, grazing or other lease to any surface interest in land in which the deposits are segregated, as provided in the preceding section, shall reserve to the State, its lessees or grantees the right to drill and operate oil and gas wells on such premises, and the easement, use and

right of way to enter upon and fully enjoy the mining right reserved in this article."

These sections, therefore, are within the terms of the original rule, that the State might not release the lands, or if it did it might attach special conditions to such leases. It did attach the condition in Sec. 7196 that such lease should reserve to the State and its lessees or grantees the right to drill and operate oil and gas wells on such premises, and the easement, use and right of way to enter upon and fully enjoy the mining rights reserved by the law. And the legislature did withhold it from leasing on any other terms.

Sec. 7200 of the Statutes provides for the payment of damages, which the agricultural lessee might suffer, and these rights were fully guarded by the decision of the Oklahoma Supreme Court in this case. It could not be reasonably contended that the lessee had any vested right, and the decision of the Court in merely defining his right, would not be in any way divesting him of any vested right. If he had no vested right to the land the Court by its decision of course would not divest him of a vested right. If the lessee had only the right to compensation for the injury to his surface lease and the Court preserved him this right, then he can in no sense complain. Under such conditions these assignments do not present any Federal question.

In the case of *Frisbie vs. Whitney*, 9 Wall. (76 U. S.) 187; 19 L. Ed. 68, the Court held that a claim to public land which did not rise to the dignity of a vested interest could not affect the right of Congress to dispose of the public domain. Justice Miller uses this language in the opinion:

“On the other hand, it will hardly be contended that anything short of a vested right in this land could deprive Congress of the right which it has as owner and holder of the legal title, and, by the express language of the situation, to dispose of and make all needful rules and regulations respecting the territory or other property of the United States.”

In the case of *Rector vs. Ashley*, 6 Wall. (73 U. S.) 142, this Court emphasized the principle that until the title of the claimant became a full vested legal title that Congress had the power to make any disposition of the land it saw fit. Both of these last cited cases are interesting because it is held that a claimant of land can only assert an interest to the land by virtue of some provision of the law, and that the acts of such claimant in themselves confer no right upon the claimant.

In the case of *Hutchings vs. Lowe, et al.* 15 Wall. (82 U. S.) 77; 21 L. Ed. 82, all the earlier cases were reviewed. Justice Field writing the opinion of the case held, that no title ever passed to the claimant of public lands until some law had been passed permitting a sale of the land, and some acts done which constituted a purchase of the lands. After asserting that a preference right to buy gave no vested right, because there could be no assurance that the claimant would exercise this preference right and pay in the money and there being no way to compel him to exercise such preference right and make the required payment said:

“The Court cannot assume, and then found a decree upon the truth of the assumption, that the defendant would have complied with the provisions of the pre-emption laws, had Congress never made the grant. Nor could it make any such assumption even if it were held that those laws surrendered unconditionally the entire public lands to settlers, in-

stead of allowing to them the privilege of pre-emption provided the lands are offered for sale in the usual manner."

The Court further stated in discussing the claim of counsel, that a preference right constituted a vested interest, as follows:

"The whole difficulty in the argument of defendant's counsel arises from his confounding his distinction made in all the cases whenever necessary for their decision, between the acquisition by the settler of a legal right to the land occupied by him as against the owner, the United States; and the acquisition by him of a legal right as against other parties to be preferred in its purchase, when the United States have determined to sell."

While there is much fog created in the specious claims of plaintiffs in error, with slight straining of the vision we can see clearly that no real grounds exist for federal review. Price's interest is limited by law and contract to a use of the surface for agricultural and grazing purposes, and the payment to him for the injury to the surface is a full protection of that right. The laws of the State providing for segregation, or the manner of the segregation of the land from sale, did not affect his surface interest and therefore divested him of no vested interest and effected no contract which he had. As said by Judge Peckham in the case of *New Orleans Water Works Co. vs. Louisiana Sugar Refg. Co.*, 185 U. S. 336, 344:

"It has long been the holding of this Court that in order to warrant the exercise of jurisdiction over the judgments of state courts, there must be something more than a mere claim that a Federal question exists. There must, in addition to the simple setting up of the claim, be some color therefor, or, in other words, the claim must be of such a charac-

ter that its mere mention does not show it destitute of merit: there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up."

In the case of *New Orleans vs. New Orleans Water Works Co.*, 142 U. S. 79, referring to the averment in the Federal question, it is stated:

"It must not be wholly without foundation. There must be at least color or ground for such averment, otherwise a Federal question might be set up almost in any case, and the jurisdiction of this court invoked simply for the purpose of delay."

In *St. Joseph & G. I. R. Co. vs. Steele*, 167 U. S. 659, it is stated:

"Not every mere allegation of the existence of a Federal question in a controversy will suffice for that purpose. There must be a real, substantive question, on which the case may be made to turn."

We, therefore, insist that the appeal presents no bona fide Federal question and no reasonable grounds for appealing the case to this Court, and that it ought to be dismissed and the judgment affirmed.

GEO. F. SHORT,
Attorney General of Oklahoma.

C. W. KING,
Asst. Atty., General.

GEO. E. MERRITT,
Attorney for the Commissioners of the land Office.

W. H. FRANCIS,
& B. B. BLAKENEY,
Attorney and Solicitor for the Magnolia Petroleum Co.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1932

No. 14

WILLIAM T. PRICE ET AL. PLAINTIFFS IN ERROR

vs.

MAGNOLIA PETROLEUM CO. ET AL.

WRIT FOR HABEAS CORPUS IN ERROR

GEORGE F. BROWN,
Attorney General

C. W. KING,
Assistant Attorney General

GEORGE H. BROWN,
Clerk of the Supreme Court

W. H. BROWN,
R. H. BROWN,
Messrs. BROWN & BROWN,
Attorneys for Magnolia Petroleum Co.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 106.

WILLIAM T. PRICE AND ORA PRICE, PLAINTIFFS IN
ERROR,

VS.

MAGNOLIA PETROLEUM COMPANY, A JOINT
STOCK ASSOCIATION; JOHN SEALY, E. R. BROWN,
R. WAVERLY SMITH, E. E. PLUMLY, AND W. C.
PROCTOR. TRUSTEES; STATE OF OKLAHOMA *ex*
Rel. COMMISSIONERS OF THE LAND OFFICE
OF THE STATE OF OKLAHOMA AND *ex Rel.* S.
P. FREELING, ATTORNEY GENERAL OF THE STATE
OF OKLAHOMA, DEFENDANTS IN ERROR.

Brief For Defendants in Error

Plaintiffs in error have filed two briefs, one of which was signed by Judge J. F. Sharp and others, and one signed by Judge A. T. Boys alone. We will designate the briefs in our argument as "Sharp Brief" or "Boys Brief" respectively.

The statement of the case made by the plain-

tiffs in error is substantially correct, though portions of such statement are incomplete.

The record in this case, commencing at page 26, contains an agricultural lease which forms the basis of the rights of the plaintiffs in error. This agricultural lease is dated the 2d day of January, 1913, and runs for a period of two years. The granting clause in this lease provided that the premises were leased and let to William T. Price, to have and to hold the same for a period of two years from the 1st day of January, 1913, to and including the 31st day of December, 1914, provided, however:

"This lease is made subject to the rights of the State of Oklahoma to sell and convey the land herein described at any time, and that upon such sale, if any be provided by law prior to the existence of this lease, the same shall thereupon expire *and the party of the second part shall, as the lessee, be entitled to same at the highest bid,* subject to such conditions, limitations, restrictions, and exceptions as may be provided by law."

The italicised words, "and the party of the second part shall, as the lessee, be entitled to same at the highest bid," are erased by a red ink line being drawn through the same. This lease further provided that the

"said party of the second part hereby agrees, binds and obligates himself * * * that he will not mine or move, or permit to be mined or moved any mineral therefrom * * * the said party of the second part hereby agrees, binds, and obligates that he is leasing said land for agricul-

tural and grazing purposes; and that he will use and occupy the same for no other purpose."

On pages 30 to 32 of the printed record is found an extension certificate signed by Commissioners of Land Office and W. T. Price in which appears the following clause:

"Such extension being made subject to all laws of the State of Oklahoma, which are now or may hereafter be in force and effect, and which may hereafter be passed,"

and providing in such extension that the same expired on the 31st day of December, 1915. It appears from the record that Price continued to hold said property in the sense of a tenant holding over, without any further contract with the State of Oklahoma.

On the 26th day of August, 1915, an order was entered by the Commissioners of the Land Office of the State of Oklahoma segregating the land in controversy for mineral purposes, a copy of which order is found on pages 117 and 118 of the record. We call special attention to the following in the segregation order:

"After discussion by the Board it was thereupon moved by Mr. Lyon and seconded by Mr. Howard that the above sections and quarter sections be declared valuable for mineral purposes, and that the same be segregated and withheld from sale.

"All voted "aye" motion prevailed."

There are other matters material to this contro-

versy which we will refer to in the various subdivisions of our argument.

No Federal Question Presented.

We filed a motion to dismiss the appeal taken in this case upon two grounds: first, that no *bona fide* Federal question was presented; and, second, that the plaintiffs in error did not plead any fact showing any title in themselves, and were therefore precluded from raising any Federal question. These propositions seem to be obvious. The plaintiffs in error have filed complicated briefs, but everywhere it is apparent: first, that Price has no claim under any Federal Act; and, second, that it is immaterial to him whether the acts of the Legislature are valid or invalid. We do not care to enter into an extended discussion that the right to appeal cannot be prevented by the decision of the State court upon a non-Federal question, if a determinative Federal question is properly involved, because in the case at bar Price asserts his claim to the property under State statutes and the Supreme Court of the State, in the decision rendered, held that these State statutes gave Price no rights to the land. The question might be briefly stated as follows: The act of Congress, known as the Enabling Act, for Oklahoma, 34 Stat. L., 267, passed and approved June 16, 1906, gave section 33 to the State of Oklahoma for public buildings' purposes. Section 10 of this act, which is copied in Sharp's brief on pages 2 and 3, provided:

"That said sections thirteen and thirty-three aforesaid, if sold, may be appraised and sold at

public sale, in one hundred and sixty acre tracts or less, under such rules and regulations as the Legislature of said State may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale."

Other provisions appear regulating the leasing of the land and the appraisement of the improvements of the lessee. Nothing in this section required that the State should sell the land, and when we follow plaintiffs through the labyrinth of refinement drawn in their brief we find that their claim rests on statutes of Oklahoma which plaintiffs claim authorized a sale.

At pages 29 and 30 of Sharp's brief, plaintiffs state the contentions of the several parties, and say under the third subdivision:

"That the State may sell said land:

(a) Under such rules and regulations as the Legislature may prescribe.

(b) Preference right to purchase at the highest bid being given to the lessee."

This discloses the theory of counsel that the State was not required to sell, and that the preference right to purchase being given to the lessee, can only arise *at the time of the sale*. It is alleged in the pleadings and restated frequently in the briefs that no sale was had, and it would then seem to follow that no preference right to purchase could have come into operation.

The controversy seems to arise, if we are capable of understanding counsel, because of the assumed con-

flict between two or more acts of the legislature. The Legislature of Oklahoma first provided, as it appears on page 6 of Sharp's brief, that "where such lands are by said Commissioners deemed valuable for oil and gas, such Commissioners shall enter of record in their office their finding, declaring that such oil or gas character exists, and further declaring that the oil and gas deposits are segregated from the surface use and interest therein, and such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this act."

Counsel contend: first, that this act was in conflict with the act passed March 2, 1909, requiring the Commissioners to dispose of sections 13 and 33, and also in conflict with the proviso of section 1 of that act, which provides:

"Provided, further, That where any part of the above enumerated and described lands are known to be valuable for mineral, including gas or oil, such part of said land should not be sold prior to January 1, 1915."

The plaintiffs must rest their case upon the proposition that the State of Oklahoma had ordered the property sold, before they can build up their attenuated theory that because it was not sold they acquired some rights. These two acts of the Legislature came to the Supreme Court of the State, and it was there decided that there was not a conflict, and that the Statute passed and approved May 26, 1908, commencing at page 6 of Sharp's brief, was continued in force and governed

and controlled the action of the Commissioners of the Land Office in this matter.

The decision of the Supreme Court is found in 86 Okla., commencing at page 105, and at page 112, it is stated:

"Article 3, Chapter 69 of R. L. 1910, authorizes the Commissioners of the Land Office to segregate oil, gas and other mineral lands, and to reserve the rights of the State to all oil, gas and other mineral lands from the surface lessees."

If it be conceded that the Act of Congress did not require a sale of the land, then it must follow that we must look to the laws of the State to determine whether a sale has been authorized. The decision of the Supreme Court expressly holds that the State was not obligated to sell this land. It is stated in the opinion:

"The only rights he (Price) had were those defined by the laws of the State, which rights, as defined both by the laws and by his lease contract, are no more than the preference right to re-lease such land for agricultural purposes at the expiration of his lease, if the State elects to re-lease it, and the right to purchase same when sold by the State, if the State should sell it. He has no right, under the law or under his lease contract, to force the state to sell such lands until the State elects so to do."

It cannot be contended that the State court was deciding this case upon Non-Federal questions to defeat the jurisdiction of the Federal tribunals, because Price was claiming that under these State laws he was entitled to have this land sold, and was entitled to ob-

tain title thereunder. When the State Supreme Court held that the State was not required to sell, and that he (Price) could not buy, under the laws of the State, the court was merely answering the contentions which he made. When the State court held that the land could not be sold under the State Statutes, Price obtained no title and it became immaterial to him whether some of their provisions were in conflict with the provisions of the Enabling Act. However, there was no conflict,—the Enabling Act said the State might keep or sell these lands, and the Supreme Court held, in construing the acts of the Legislature, that the State had kept this particular land.

It would seem to us clearly unsound for Price to assert that, under the laws of the State, he was entitled to buy this land; and, when the Supreme Court construed these laws, and held that he was not entitled to buy it, for him to say he was deprived of some right or privilege under the Federal Constitution. His whole right is predicated upon the laws of the State. He assumed that under the laws of the State, the State officials should have sold the land, and then asserts that because they did not sell it they deprived him of some preferential right.

We think the conclusion is undoubted that if the State law did not require a sale, he is deprived of nothing, but still has the preferential right and will be fully protected in it when the property is sold, if he is then the tenant in possession.

It is rather apparent, when the plaintiff's claim

is sifted down, that he is contending that he owns this land, not under the provisions of the Act of Congress, but contrary to its provisions. The Enabling Act expressly provided that the lands should be advertised for a certain period of time and should be offered at public sale, and that the highest bid therefor should be obtained, and that Price might then elect to take the land at the highest bid. He now contends that the land was not advertised and was not sold, and that no highest bid was obtained, but that his preference right is superior to all these provisions and gives him the right to take the land at the appraised value.

The Legislature could not authorize the passing of title from the State to Price, and no court could enter a decree to pass this title to Price contrary to the provisions of the Enabling Act, which directed the advertisement of a public sale and the procurement of the highest bid therefor. So that if all the contentions of Price are true, that the State directed a sale and the officers did refuse to make such sale, he still can assert no rights under any act of Congress because he does not pretend that any sale was made, or any sale was advertised, or that any highest bid has ever been procured, or that he has any way of knowing what the highest bid would have been, and whether or not he would have taken the land at such high bid.

Price founds his claim upon so many presumptions which, from the nature of things, it is impossible to determine, and all of which are contrary to the express language of the act of Congress. If this land had been offered for sale, can it be determined what would have

been the highest bid, or can it be determined that Price would either have had the disposition or the ability of accepting this land at the highest bid? But whatever is the conclusion to be drawn from this claim of Price, it is obvious that he bases his title upon the laws of the State authorizing a sale. The State Supreme Court could decide that question, and this court cannot without construing the laws of the State.

In the recent case cited by plaintiffs, *Ward vs. Love County*, 253 U. S., 17, this court expressly said:

"We accept so much of the Supreme Court's decision as held, that, if the payment was voluntary the money could not be recovered back in the absence of the permissive statute, and that there were no such statute."

The court would in this case undoubtedly hold that, when the Supreme Court of the State held that under the laws of the State the Commissioners of the Land Office were authorized to segregate this land, and that such order of segregation prevented the Commissioners from selling the same, such was the law of the State of Oklahoma. The decision of the State court was not made for the purpose of evading the Federal jurisdiction, but it was applying and construing the State laws presented by Price.

Counsel in their argument, Sharp's brief, commencing at page 64, state as follows:

"To use and apply the language in *Buxton vs. Traver*, 130 U. S., 232; 32 L. Ed., 920, the State, by this statute, made the lessee a 'promise to sell

him his home on those terms, entered into a contract with him on the subject'."

The Legislature had not made any promise to sell Price any home, but, upon the other hand, enacted a law, of which he had full knowledge, that it would not sell at any time any of the lands valuable for mineral.

The case of *Pennoyer vs. McConnaughy*, 140 U. S., 1; 35 L. Ed., 363, relied upon by counsel, when properly explained, is an authority against their contention. The State of Oregon had passed an act providing for the disposition of certain swamp lands. While this act was in force, Henry C. Owens made application to purchase a portion of the said lands and paid to the Board of Commissioners the twenty (20%) per centum provided by law on the purchase price of the land. The land was transferred subject to the payment of the balance of the money. The Legislature of Oregon passed a law providing that where the payment had not been made the land should revert to the State. The Board authorized to determine the land controversies in the State of Oregon had held that the applicant had complied with the law, and that though the money had not actually been paid, until the law was changed, that the nonpayment of money was due to the fact that no proper survey had been made. The court thereupon, in construing the act of the Legislature referred to, said:

"The powers and duties of the Board of Commissioners were defined by the Supreme Court of the State in the following language: 'This Board was created by the State Constitution and by it

invested with the power to dispose of these State lands, and its powers and duties are such as are provided by law. It is composed of the Governor, Secretary of State and State Treasurer, and is a part of the administrative department of the Government, and exercises its powers independent of the judiciary department, and its decisions are not subject to be reversed by the court. It occupies in this State the same relation to the State judiciary as the Land Department of the United States does to the United States courts, and their decisions have not been the subject of review by the United States courts.'

"The principle that the contemporaneous construction of a statute by the executive officers of the Government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit, or right is involved, or unless the construction itself is manifestly incorrect."

The case states the law which we think is controlling in this case—that where the Board of Commissioners had authorized the sale of the property and had made the sale, though the payment was not actually made, but the party was ready to make the payment, and it was subsequently made and accepted, a vested right would result. Upon the other hand, where the Board had by resolution segregated the land and directed that the same should not be sold, we think it

is equally clear that a sale could not be made, and the construction of the Board would be followed by the court and its action upheld. Justice Lamar in *Pennoyer vs. McConnaughy*, stated the rule that is now everywhere recognized, that the construction given to the law by the officers authorized to execute it would if reasonable be followed by the court, but he reaffirmed the rule stated in the Yosemite Valley case, which he cites with approval.

The Supreme Court of Oklahoma has construed the statutes involved in this case. It is held that the statute authorizing the Commissioners of the Land Office to segregate lands deemed valuable for oil and gas is valid. It construed the statute ordering a sale of a part of the school land and held that such statute did not require the Commissioners of the Land Office to sell land which they deemed valuable for oil and gas. Having interpreted these statutes, and construed them, and having held them valid, such construction by the Supreme Court of Oklahoma will be accepted in this court.

The construction of the statutes by the Supreme Court of Oklahoma will not only be followed by this court, but such construction will be regarded as a part of the provisions of the act, when this court is called upon to determine whether it violates any right secured by the Federal Constitution.

In the case of *Joseph M. Douglass vs. Pike County, Missouri*, 101 U. S., 678, Mr. Chief Justice Waite, in the first syllabus stated the law to be as follows:

"This court treats the construction which the

highest court of a State has given to a statute of the State as a part of the statute."

Mr. Justice Van Deventer, in the case of *Lindsley vs. Natural Carbonic Gas Company*, 220 U. S., 61, at page 73 announced the same rule in the following language:

"Coming to the provisions in question, it is necessary to inquire what construction has been put upon it by the highest court of the State, for that construction must be accepted by the courts of the United States, and be regarded by them as a part of the provisions when they are called upon to determine whether it violates any right secured by the Federal Constitution."

Weightman vs. Clark, 103 U. S., 256, 260.

Morley vs. Lake Shore & M. S. R. Co., 146

U. S., 162, 166.

Olsen vs. Smith, 195 U. S. 332, 342.

At page 68 of Sharp's brief they quote from the act approved March 2, 1909, which is attached to their brief as "Appendix C," the following:

"The Commissioners shall dispose of, sell, and convey, subject to the limitations, exceptions, conditions, rules and regulations and instructions, as provided in the Enabling Act," etc.

It is then asserted that the Legislature regarded only "limitations, conditions, rules and regulations and instructions of the *Enabling Act*." This, of course, was an error and the quotation is inaccurate. The act reads as follows:

"The Commissioners of the Land Office shall

dispose of, sell, and convey, subject to said limitations, exceptions, conditions, rules, regulations and instructions, as provided in the Enabling Act, in this act, or in any act amendatory hereof, except where same is embraced in any reservation specifically reserved from sale in this act, or in any act of Congress, or in any act of the State, specially reserving any part thereof for any special purpose."

This clause recognized the act of the legislature previously passed and approved May 26, 1908, which provided that the Commissioners should reserve all lands deemed to be valuable for mineral, which act is found in Sharp's brief as "Appendix B." The proviso found in section 1 of the Sale statute, marked as "Appendix C," which stated that where any part of any of the above enumerated and described lands are known to be valuable for mineral, including gas or oil, such part of such land shall not be sold prior to January 1, 1915, was inserted to meet the requirement found in section 8 of the Enabling Act. The word, "known" as used in this proviso, was not intended in any sense to change the Segregation statute marked as "Appendix B," and the words in the statute which "except from sale lands reserved from sale in that act, or in any act of Congress, or any act of the State," referred to the only two exceptions then existing: first, the exceptions noted in section 8 of the Enabling Act, and, second, the exceptions noted in the act of May 26, 1908, the Segregation Act, designated as "Appendix B" in Sharp's brief.

The record discloses the following facts: That

on the 8th day of June, 1902, a lease was executed to the land in controversy to William T. Click for a term commencing the first day of January, 1902, and expiring the first day of January, 1905. This lease appears in the record commencing at page 47. On the first day of January, 1905, this lease was renewed for the full term of three years, which appears on page 51 of the record. This lease would therefore expire on the first day of January, 1909.

It appears that appraisers were sent out under the laws of the State into the different counties of the State and different appraisers were required for the different counties because of the provision that an appraiser should not be selected from any county in which the property to be appraised was situated. It appears from the record that the blank that was taken out by the appraisers to appraise this land, and which is included in the record at page 146, showed that the lessee was William T. Click, whose post-office address was Comanche, but that the appraisers found the family of William T. Price in possession of the property and evidently wrote the name of William T. Price in front and on the margin of the appraisement blank as the same appears at page 140 of the record.

The fact that Price's name was written on the margin and in front of the word "lessee", is disclosed from the second appraisement which was in the same form and is found on page 146 of the record. At the top of the appraisement appeared the description of the land and then followed the word

"lessee", then the name of the lessee of record was inserted in the blank. At the time of the preparation of the blank, William T. Click was the owner of this land. Mr. Price testified at page 137 that his family was on the land but that he was absent at the time the appraisers visited the land.

At page 55 of the record is Exhibit "D", and attached to the answer of the plaintiff in error is the assignment from Click to DeArman. This assignment is dated the 31st of December, 1908. This assignment, however, was undoubtedly filed after the 31st of December, 1908, in the Capitol at Guthrie, and the appraisers were at the time in Stephens County, many miles from the Capitol, with blanks that had been previously prepared, and this appraisal was made afterwards, to-wit, January 2, 1909. They, therefore, amended the blank by inserting Price's name upon the margin preceding the word "lessee".

But as a matter of fact no assignment had been made to Price, and on May 12, 1909, the records of the Land Office at the Capitol showed that the title of the lease was still in DeArman (Rec. p. 130), where it will be noted that on May 12, 1909, the Commissioners of the Land Office issued an extension agreement of the lease to DeArman, and that this extension extended the lease until the 31st of December, 1909, but it was assented to by DeArman on the 17th day of June, 1909, (See Rec. p. 131).

It does appear, however, that on the 15th day

of October, 1909, (Rec. p. 138), that W. T. Price procured from DeArman an assignment, and he testifies that he sent the same to the Land Office, but there is no evidence that the interest of Price became recorded until he obtained a lease therefor.

On the 2nd day of January, 1913, William T. Price procured a lease of this tract of land for a term of two years, which lease appears at pages 26 to 30 of the record. This lease was subsequently extended, as appears at page 132 of the record, by agreement of March 6, 1915, which was accepted by Price, and extended the lease from the 1st of January, 1915, to 31st of December, 1915.

The appraisalment was ordered by the Act of the Legislature passed April 8, 1908. The second section of Article 2, Chapter 49 of the 1907 and 1908 Session Laws, authorized the appraisalment. At the time this appraisalment was authorized there was no provision for the sale of the property. On the 2nd of March, 1909, the statute which is called by plaintiffs the "Sale Statute," was passed by the Legislature of Oklahoma and provided that a sale should be made under the appraisalment of 1908. Section 4 of the Sale Statute provided as follows:

"Said lands and improvements thereon shall be sold under the appraisalment of the year 1908, made and returned to the Commissioners of the Land Office; Provided, that in the event it shall appear the said land or improvements have not been properly appraised, the Commissioners of the Land Office shall have the

power to order and provide for a new appraisalment; Provided, further, the Commisisoners of the Land Office shall notify the lessee before such land is offered for sale of the appraised value of his improvements and should any such lessee be dissatisfied with the appraised value of his improvements, said lessee shall within thirty days from notice thereof, notify the Commissioners of the Land Office in writing; whereupon the land covered by said lessee's contract shall be reserved from sale, pending a review of the appraisalment made by the said Commissioners of the Land Office in the District Court of the County in which said land is located. An appeal from the Board of Appraisers may be taken as provided in 'An Act amending Section 28, Article 9, Chapter 17. of the Statutes of Oklahoma, 1893, and regulating the method of procedure in the condemnation of private property for both public and private uses,' approved May 20, 1908; and the procedure of such appeal and the review and demand for jury trial in said court shall conform to the procedure therein set forth; and pending the termination of said appeal the lessee shall be entitled to remain in possession of said property, paying therefor as rental five per centum of the appraised value of said land upon which said improvements are located; Provided, however, in addition to that which is herein stipulated, there shall nowhere be a meaning of any or all of the provisions or of the sections of this act, collectively or severally, so construed as to extend to any lessee the preference right of purchase to any of the lands withdrawn from homestead entry and granted to the State under and by virtue of Section 12 of the Enabling Act."

It will be noted that there were two conditions in this section: first, that the Commissioners of the Land Office might arbitrarily direct a re-appraisement of any land; and, second, that they should notify the lessee so that he might take his appeal within proper time, and that in either event, the land should be reserved from sale and should be leased.

It appears that DeArman could not be served with a copy and he was at that time the record owner of the land. Mr. Price testified at page 137 of the record as follows:

"Q. Did you secure a relinquishment later?

"A. Yes, sir; in a week or two weeks it finally come when we found Mr. DeArman; he was in Texas; nobody knew where he was."

This statement of Price is to the effect that DeArman was in October, 1909, in Texas but his residence was unknown and this appraisement was completed January 2, 1909, and the act requiring the sale and directing that notice be served before such sale was approved March 2, 1909; and the Resolution, which counsel claimed was an approval of this appraisement found on page 142 of the record, shows that the appraisement was approved March 25, 1909.

It appears now from an examination of these statutes that no sale could be made of this land, because the appraisement could not be served upon DeArman, whose residence was unknown, and the

appraisement was not satisfactory to Price. As his assignment was not of record, he was not served with the notice of the appraisement and had no right of appeal.

This condition apparently continued during 1909 and 1910. The sale in that county evidently was on the 18th or 19th of January, 1911, but Price not being the owner of the lease of record in the Land Office no notice of the appraisement was served upon him, and the land was not sold at this sale. (See Rec. pages. 168, 169) If on the other hand we assume that his assignment was recorded, we may look to the correspondence in 1910, on pages 232 and 233 of the record, which is as follows:

"Comanche, Okla., Feb. 19, 1910.

Mr. Ed. Cassidy,
Dear Sir:

I wrote you before Christmas about the re-adjustment of NE $\frac{1}{4}$ of Sec. 33 of Stephens County and you said you would notify me the first of the year when the adjusters come to Comanche Co. But they have already been there and have heard nothing. *I want to get this place re-appraised* and would like for it to be straightened out before the rest of the land sells, as I want it to go with the rest. Was not pleased with the first appraisement and if something is not done before time for it to sell there will be a balk in the sale. What must I do about this re-adjustment I wanted it done and you did not notify me when they met in Co-

manche County. Let me hear from you at once.

Respectfully,

W. T. Price.

P. S. If this is not going to sell this year I want to make a trade with you to cut some wood off the pasture land, but if it does sell I will not do it."

(Italics ours)

And Mr. Cassidy replied as follows:

"Feb. 21, 1910.

Re Re-adjustment.

Mr. W. T. Price.

Comanche, Okla. No. 4.

Dear Sir:

Replying to yours of the 19th inst., our record show you have on file an *application for re-adjustment and correction* of the 1908 appraisalment on the NE $\frac{1}{4}$ of Section 33, 1 S. 8. This application will be heard at the next meeting of the adjusters Board in Stephens County; it is not possible to have the hearing in time for the land to be placed on sale in the first sale of lands in that county; it will probably be next winter before this land will be sold.

Yours very truly,

Ed O. Cassidy,
Secretary."

(Italics ours)

Price did not want the land sold under the old

appraisement in 1909. He testified at page 164 of the record, as follows:

"A. Where they got it wrong, when I said I didn't want to sell, I said I didn't want to sell under that appraisement on my improvements; I said there were two men who were arranging to buy this place in if I signed this up, and when their adjusters came around I told them I wasn't willing to sell the way my improvements were appraised."

It appears that an adjuster had been around to see Price during the period between the first appraisement and the second appraisement, and when the second appraisement was made Price consented to and accepted the second appraisement as just and fair. It is obvious to us then that no sale could be made prior to the time the land was segregated.

Price, then, on the 21st of January, 1913, as appears from the record at page 26, took an agricultural lease to this land running for a period of two years, and on March 6, 1915, consented to an extension of this lease which appears on pages 30 to 32 of the record, which extended the lease until the 31st of December, 1915, and prior to the expiration of this lease, to-wit, on the 26th of August, 1915, the land was segregated for oil and gas purposes, and under the segregation statute the land was withdrawn from sale.

It would appear from the discussion of counsel in this matter that the sale statute would repeal all other statutes, and that the Commissioners had no

discretion except to provide a sale. If this was true, Price could obtain no rights. He could only buy the property when and if it was sold. The Act of Congress expressly provided in section 10 of the Enabling Act that, *if sold*, the land should be appraised and sold at public sale, and with the preference right to purchase at the highest bid being given to the lessee *at the time of the sale*; and it provided further that before any of said land should be sold, that the improvements and land should be separately appraised.

The Legislature could not pass title to Price in any form other than after such public sale. If the Commissioners of the Land Office neglected to do their duty, Price could have compelled by mandamus the officers to offer the same for sale. This right, however, was not confined to Price. Any citizen eligible to buy this land of the State had the right to bring such mandamus proceeding to compel the officers to perform their duty, if it was their duty to make such sale, and any citizen could make a bid upon the land, and if the lessee did not desire to purchase the land at the high bid, the highest bidder would become the purchaser of the land.

It certainly, however, cannot be contended that a citizen now could come into court and say it was the duty of the Commissioners to sell the land; that he was ready and willing to make the highest bid, and that the lessee would not purchase the land at his bid, and therefore he is entitled to the property. Admitting that the land officers were obligated to

make the sale by virtue of the Sale Statute, the situation would be very similar to a case where an execution is issued to a constabulary officer and the law directs him to execute such writ by levying upon, advertising, and selling the property of defendants.

Had the sheriff levied upon the property of the debtor and appraised the property, but failed to advertise or sell the same, then could a prospective bidder come in and assert that the land would have sold for only two-thirds of the appraised value, as provided by law, and that he was ready to bid that amount, or did actually offer the amount to the sheriff and ask the court to confirm title in him? The statement of such a proposition is its own answer. However, in the case at bar the land commissioners were not required to sell the property, but were expressly precluded from selling it both by the act of Congress and by the Segregation Act of the Legislature.

Counsel insist that the Sale Statute only reserves lands *known* to have mineral, and that this land *was never known* to have oil until after a well had been drilled on the land and oil produced. The Segregation Act withdrew the lands deemed valuable for oil or gas. The act of Congress provided, "where any part of the lands granted by this act to the State of Oklahoma *are valuable for minerals, gas, and oil,*" that the same should not be sold prior to January 1, 1915. It is, however, a quibble to assert that there is any difference between the phrases, "deemed valuable for oil;" "known to be valuable for oil," and

"valuable for oil." None of these statutes containing these phrases contemplate that such lands should be producing oil or gas, but the leases were made in order to induce development for the purpose of determining whether the same possessed oil and gas.

There could be no actual knowledge whether oil or gas existed in the bowels of the earth beneath the land, so that it was merely intended that when the Commissioners acting for the State, in the exercise of their discretion, determined that it was valuable for oil and gas, that the same should be segregated. The act of Congress in using the term, "valuable for oil and gas," was using rather a comprehensive expression. We say lands are valuable for oil and gas when the public is willing to buy a lease upon the land or pay a substantial price for mineral rights. The land is undoubtedly valuable for mineral when a substantial consideration can be obtained for such supposed mineral rights, though neither of the parties to the transaction may have any actual knowledge as to whether minerals are located under the lease.

But we pause to repeat that the Segregation Statute did reserve the land from sale, and the State did direct that the same should not be sold, and that if this statute was repealed, it was repealed by a State law and the question is a construction of a State law. When Chief Justice Harrison in his decision in the Supreme Court of Oklahoma held that the Segregation Statute was in force and prohibited the sale of this land, it was a construction by the

highest court of the State of a State Statute, and will be controlling in this court.

Forced Sale.

On page 88 of Sharp's Brief, under the sub-head of "Forced Sale," counsel say:

"We want to be clearly understood as asserting that we consider * * *

"(4) That the defendant, Price, lessee, accepted such statute, demanded his land at the auction, at his court-house, when all there was offered, and there being no other bidders, offered to take it at the appraised value on the terms fixed by the statute. (Appendix 'C'). He did all he could do.

"(5) That thereby, in legal effect a sale was consummated and the equitable estate passed, Price having done all the law imposed upon him, and the Commissioners having no option or discretion in the matter, and no power of refusal."

The fact that other lands were sold at "his court-house" would be immaterial and it would be equally immaterial whether bids were made or not for the other lands so offered. In other words, carrying the simile which we have heretofore given a little further, if a sheriff with an execution levied upon some lands of the debtor and advertised the same for sale, a purchaser who was desirous of bidding on other lands of the debtor could demand that the sheriff offer them for sale, and if he refused he could claim the equitable title to such other lands. However, in this case Price had

been notified by a letter from the secretary of the Commissioners that his land could not be sold because it could not be re-appraised within time for advertisement. His demand, if his action can be construed to be a demand, was upon the auctioneer, who had no authority to sell any land except such as he had been directed to, and he had been directed to sell only such lands as had been advertised.

After this excerpt, on the same page, counsel assert:

"The Supreme Court of Oklahoma did not disturb these findings of fact at all, and reversed the decree on the theory only that Price had no preference right in or to the land."

The reversal was on no such theory. The court recognized the preference right of Price to purchase at the time the sale should be made, but the court held that no sale had been made and that under the law no sale could be made by the officers of the State, and therefore Price had no interest in the land. In 1910, under the express provisions of section 8 of the Enabling Act, the State could not sell lands valuable for minerals, and under the Segregation Act of the State of Oklahoma, the Commissioners were required to segregate from time to time lands deemed valuable for mineral, and the order of segregation precluded a sale of the property.

There is much said in counsels' brief about the oil development taking all of the value of the land excepting, "such small salvage as might be from removed im-

provements." This is untrue. The substantial part of the surface is uninjured by oil development and operation. But the State was not required to lease the land to Price even for agricultural purposes, and much of the lands of the State are not leased. Some are laid off into town sites, some are leased for rock quarries and surface mining. The rule providing for leasing, gave to the lessee the right to re-lease only "in case the State desires to lease the land." If the State is not required to lease it at all, they might lease to Price only such portion of the land as is not necessary for mineral development and Price accepted his lease with the express provision in the Segregation Statute that it should be in all respects subject to the use of same for mining purposes. Upon the other hand, the Segregation Statute, being "Appendix B" of Sharp's Brief, in section 6, provided as follows:

"Any person, firm or corporation leasing under the provisions of this act and operating for oil and gas, shall be liable to the surface owner, the lessee or purchaser, for all damages or loss accruing to the surface interest in said land, and to all crops and improvements thereupon and appurtenances and hereditaments thereunto belonging, whether said land be agricultural, timber, grazing or otherwise."

On page 92 of Sharp's Brief it is contended that if the Commissioners were authorized by law to sell, and failed to sell, that it would be making such Commissioners superior to the law. This would not be true. On proper application the Commissioners would be re-

quired to comply with the law, but in the case at bar the Supreme Court of the State held that the Commissioners had strictly followed the provisions of the law and their acts were in all regards measured by the provisions of the law.

Counsel quote from section 21 of the Act of May 26, 1908, being an act different from the Segregation Act, but relating to mining prospecting on State lands. Section 21 of the act says that all preference rights, vested rights and equity, should be inherent rights, and after citing cases from Oklahoma, says:

"These opinions and the principles thereby established were by the State Supreme Court in this case overlooked, or at least not given effect."

(Page 94 of Sharp's brief.)

None of these opinions were overlooked, and none of these principles were misapplied. However, if the Supreme Court of the State did overlook or fail to give effect to these decisions, this court cannot correct the decision of the State court, but must accept the State decision as being a proper construction of the State statutes. Much is said that the findings of the trial court are unreversed by the decision of the Supreme Court. The findings of the trial court were all reversed and a perpetual injunction was issued by the Supreme Court.

Counsel at page 95 of Sharp's brief state the rule that equity treats, that which ought to have been done, as having been done, and says therefore that the Commissioners ought to have sold the land and that

equity will treat the property as having been sold. This is a correct statement of the law, but is a misapplication. If, for instance, a sale had been made by the Commissioners without an advertisement, the sale would be invalid because the Commissioners are required to have advertised the property. Or, carrying out the similarity suggested as to an execution sale, counsel would claim that he had title because the sheriff ought to have levied, appraised, advertised, and sold the debtor's property. This rule can never be applied when there is a condition precedent to the vesting of title. This maxim of equity is also denied when its application would confer greater rights on the party than he would have, had the obligation been performed.

Gardiner vs. Gerrish, 23 Me., 46.

It would be unlawful for the Commissioners to give a deed to Price without having advertised the property and procured the highest bid, and if such deed was given it would convey no title. Equity would not require the Commissioners to make title against the express law. However, the application of the maxim is upon a wrong supposition. The Commissioners were not authorized to sell, but were prohibited by the law of the land, both by the provisions of the Enabling Act and by the Segregation Statute of the State, from the selling of this land.

Analysis of Work, Secretary, vs. United States.

Counsel refer frequently to case No. 258, *Hubert Work, Secretary*, vs. U. S., decided April 12, 1923, and reported in 67 L. Ed. 640. This case merely follows

the decision of the court in *Lytle vs. Arkansas* and others, which provides that when it becomes the duty of the Secretary of the Interior to issue a patent for public lands, that he may be compelled to do so. This case does not fall under the class known as the *Yosemite Valley cases*, or the case at bar. In the case of *Work vs. U. S.*, the court was construing certain acts of Congress, passed February 19, 1912, 37 Stat. L. 67, and passed February 8, 1918, 40 Stat. L. 433.

The Act of 1912, provided that the Secretary of the Interior should appraise the surface of certain lands in the Choctaw and Chickasaw Nations in Oklahoma, and should proceed to sell the same. The second section of the act provided that where any of the said lands were leased for coal or asphalt, that a certain portion of such lands might be purchased at the appraised value by such lessee, and that in case he did not within sixty days elect to purchase the same, that the Secretary should set apart so much of the land occupied by him as he deemed necessary for operating the leased premises.

The Act of 1918 provided for the sale of the coal and asphalt deposits subject to existing leases, and further provided in Sec. 4, as follows:

"Any lease shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisal of the minerals as herein provided, to purchase at the appraised value any or all of the surface lands lying within such lease held by him, heretofore reserved by order of the Secretary of Interior."

The coal company failed to take the land permitted by the Act of 1912, and the Secretary set apart certain of the lands as therein provided. After the passage of the Act of 1918, the assignee of the coal company made application to take the land so set apart to it by the Secretary under the Act of 1912. The Secretary accepted the first payment on the land, but afterwards, on protest from the Indian Nations, decided that the mining lessee could not obtain the land without a reappraisement. The Chief Justice deciding the case held that there was no provision for reappraising the *surface* under the Act of 1918, and that the reference in Sec. 4 to the purchaser taking, at the appraised value, any and all of the surface of the land lying within such lease, held by him, and theretofore reserved by order of the Secretary of the Interior, was the granting of a new right to the lessee in possession to acquire the lands so reserved by the Secretary for his use, under the old appraisement of 1912.

The construction is obviously correct. The distinction, however, is so apparent between the proposition there considered and the one in the case at bar, that no extended argument is necessary. The price which the lessee in possession was required to pay was fixed by the appraisement, and the right was not preferential only, but exclusive. In the case at bar the Enabling Act provided that the "price" should be fixed by a public sale and that the highest bid received should be accepted, unless the lessee, at the time of such sale, elected to take the land at such high bid.

In the Act of 1912 construed in *Work vs. U. S.*,

supra, no other persons were permitted to bid upon the land until the mining lessee had been permitted to make his election, and in case such mining lessee refused to take the land at the appraised value, the Secretary should still set apart to him such surface as might be necessary for the operation of his mines; and in the later act provided that the mining lessee might take the same at the appraised value. It will be noted under the Act of 1912 that no sale of the land required for operating the mines was ordered, but the United States offered same to the mining lessee, and, if not accepted by the lessee, would not be sold. The Act of 1918 reoffered the land to the lessee. The lessee accepted the land so offered and tendered the money to the Secretary and demanded his conveyance.

The very reason why the court compelled the delivery of a deed in that case is absent from the case at bar. No price has ever been fixed by which the lessee can obtain the land in controversy, because no "high bid" has ever been received, and cannot be received until made at a public sale. The sale being prohibited by the Statute, as construed by the Supreme Court of the State, the "*price*" can never be fixed.

Analysis of Enabling Act.

Preliminary to our discussion in this case, we desire to give an analysis of sections 8 and 10 of the Enabling Act.

The first part of section 8 grants certain lands for school and other purposes, and then provides that section 33 shall be apportioned and disposed of as the

Legislature of the State may prescribe. This section granted section 33 and other sections to the State for certain designated purposes. The State became the owner of this land in fee simple and had every right of ownership therein that could be given to the State, except some minor restrictions, which we will hereafter discuss. The last clause of this section provided:

"Where any part of the lands granted by this act to the State of Oklahoma are valuable for minerals, gas and oil, such lands shall not be sold by the said State prior to January 1, 1915; but the same may be leased for periods not exceeding five years by the State officers duly authorized for that purpose, such leasing to be made by public competition after not less than thirty days advertisement in the manner to be prescribed by law, and all such leasing shall be done under sealed bids and awarded to the highest responsible bidder. The leasing shall require, and the advertisement shall specify in each case, a fixed royalty to be paid by the successful bidder, in addition to any bonus offered for the lease, and all proceeds from leases shall be covered into the fund to which that shall properly belong, and no transfer or assignment of any lease shall be valid or confer any right in the assignee without the consent of the proper State authorities in writing: *Provided, however,* That agricultural lessees in possession of such lands shall be reimbursed by the mining lessees for all damage done to said agricultural lessees' interest therein by reason of such mining operations. The Legislature of the State may prescribe additional legislation governing such leases not in conflict herewith (34 State L., 273)."

The analysis now of this provision shows that the grant of all this land to the State carried with it the right of sale, except as in this section prohibited. It is an obvious rule of the construction that where a general grant is followed by an exception that the exception extends rather than limits the term of the general grant. Congress necessarily understood that this grant gave the State the right to sell the land, because in the quoted provision, it is provided:

"Where any part of the lands granted by this act to the State of Oklahoma are valuable for mineral, gas and oil, such lands shall not be sold by said State prior to January 1, 1915."

It would not have been necessary to have provided that the land should not be sold, had the power to sell not been previously given. It will be noted also that the limitation against a sale expired on the first of January, 1915. The reason for this limitation was the absence of State laws. At that time there was no provision of law in Oklahoma for leasing of lands of the State or Territory for oil and gas purposes, so Congress provided for the leasing for oil and gas purposes, but limited the Congressional restriction to a definite period and closed the section by providing that the Legislature of the State may prescribe additional legislation governing such leases not in conflict therewith. The period of limitation was sufficient to enable the State to become organized and the Legislature to adopt the necessary rules and regulations governing the further leasing of such lands.

It was further provided in this section that not-

withstanding the prohibition against a sale, that the lands might be leased for periods of five years by State officers duly authorized for that purpose. The provision that said lands shall not be sold, necessarily did not prohibit a leasing, because such prohibition was followed by a provision permitting and directing the manner of such leasing.

We think it is important to note that the word, "sale" as used in this clause, providing that "such lands shall not be sold," referred to a conveyance of the fee of the land and prohibited a conveyance of the fee, but that such prohibition in no way affected the power to lease the lands for oil and gas purposes. In other words, a lease for mineral purposes was not a sale as the term was used in the statute.

The Circuit Court of Appeals of the Eighth Circuit, in the case of *Kemmerer vs. The Midland O. & D. Co.*, 229 Fed., 872, analyzed the acts of Congress with reference to the Cherokee Indians and show that provisions prohibiting the sale of land do not prohibit the leasing of lands for mineral purposes. It also states clearly the principle that when the act of Congress has shown that the oil and gas may be severed from the fee or surface, that it is not covered by the rules or regulations providing either for the sale or the agricultural leasing of the surface. The court, in the first paragraph of the syllabus, says:

"Even in the absence of statute, the owner of land in fee, who has leased the surface without reservation, has the right to drill through the surface for oil or gas, and may convey that right by

lease to another. But as to Indian lands coming within its scope, such right is reinforced by the Act of May 27, 1908, Chapter 199, Section 2, 35 Stat., 312, which provides that leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for a period of more than five years may be made without the approval of the Secretary of the Interior, the effect of which is to make a severance of the oil and gas right from the surface."

It is obvious that the latter clause of section 8, which expressly severs or segregates the mineral deposits from the surface for a fixed period of time and provides that the Legislature may prescribe additional legislation, segregates the oil and gas deposits from the surface. However, as stated in the case of *Kemmerer vs. The Midland O. & D. Co.*, *supra*, even in the absence of statute, the owner of land, which in this instance, is the State, may segregate or sever the different strata, and may sell or lease any of same.

The word "sale" as applied to real estate, has never been construed to embrace a conveyance of an oil or gas lease. In the case of *Tibbens vs. Clayton et al.*, 288 Fed., 393, in a decision by Williams, District Judge, is found a collation of all of the authorities as well as an analysis of all of the Statutes of Oklahoma affecting a sale of an oil and gas lease.

In the case being there presented the discussion related to a sale of an oil and gas lease by a guardian of a minor under a Statute which required that the sale of real estate, must be in a particular form. Judge

Williams approved the rule stated in *Duff et al. vs. Keaton et al.*, 33 Okla., 92, in the following quotation:

"A lease granting oil and gas mining privileges for a term of years, is not a sale of realty as contemplated by Sec. 5314, Compiled Laws of 1909, or Secs. 5489 and 5491, Compiled Laws of 1909."

The sections referred to in *Duff vs. Keaton, supra*, are the provisions of the law of Oklahoma authorizing the guardian to sell the property of his ward. The Statute provides that a petition shall be filed with the County Court and a notice shall be given to the public and all parties interested in the land and upon a hearing the court should make an order of sale, and after proper advertisement the guardian might sell the property and report to the court for confirmation, and that such report should also be publicly advertised for at least ten days prior to the hearing on the application to confirm.

The question arose in *Duff vs. Keaton, supra*, and in the case of *Tibbens vs. Clayton, supra*, whether these provisions regarding the sale of the land should be compiled with in the sale of an oil and gas mining lease. The court held that an oil and gas mining lease being a mere incorporeal hereditament, that it would not be embraced under the provisions authorizing a sale of the real estate. In *Tibbens vs. Clayton, supra*, it was further stated:

"Under *Duff et al. vs. Keaton et al.* and *Allen vs. Midway Oil & Gas Co.*, which were handed down at the same time, the Supreme Court of Oklahoma

established the principle that the jurisdiction of the county courts of the state of Oklahoma to order a lease made by a guardian of his ward's land for oil and gas or such mineral purposes is not derived from the statute providing for the sale of real property, that holding being induced in a measure by the practice and usage followed by the county and recognized by the district courts and Secretary of the Interior, which had existed from the erection of the state under which a multitude of investments had been made and vast property rights arisen."

In support of the principle stated is an array of citations, which disclose that it is the universal rule in the oil producing states that an oil and gas lease is not embraced within the prohibition against the sale of real estate.

This court in the case of *Parker vs. Richards*, 250 U. S. 235, in an opinion by Justice Vandeventer, held, that the Act of Congress authorized the County Court to approve conveyances of real estate of full blood inherited lands, but did not authorize the County Court to approve oil and gas mining leases.

While we may be now anticipating the provisions of section 10, giving the lessee a preference to buy at the time of the sale, in this connection we call the court's attention to the provisions of section 8, which provide that such lands shall be leased for oil and gas purposes at *public competition*, after not less than thirty days' advertisement in the manner prescribed by law, and all such leasing shall be done under *sealed bids and awarded to the highest responsible bidder*.

This section gave no preferential right to the agricultural lessee, and he was not permitted under this section to take an oil and gas lease at the "highest bid." There are many reasons, of course, why the agricultural lessee was not given any preference. Oil and gas development requires expert knowledge, considerable investment in machinery and tools, as well as in equipment; and in order that the lands shall only be leased to persons possessing the necessary means, it was provided that the lease should be awarded to the highest responsible bidder. The agricultural lessee would neither possess the skill nor the equipment for such development. The section then provided that the agricultural lessee in possession should be reimbursed by the mining lessee for damages done to the agricultural lessee's interest.

Section 10 of the Enabling Act provided:

"Said sections thirteen and thirty-three aforesaid, if sold, may be appraised and sold at public sale in one hundred-sixty acre tracts or less, under such rules and regulations as the Legislature of said State may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale," etc.

The word "sold" as used in this section, must be given the same meaning as we have given to the word "sold" in section 8, and this section authorized that the legal title or fee simple estate of the lands might be sold at public sale.

Counsel have conceded now that the words "if sold" were not the granting of the power to sell, but

a mere recognition that such power had been granted by section 8. Congress assumed that the Legislature had this power and stated merely that "if sold" the lands should be appraised and sold at public sale. This was a definite limitation upon the power of sale and prohibited any sale except at public sale. The preference right granted in this clause attached at the time of such sale.

This section continued with further restrictions, as follows:

"But such lands may be leased for periods of not more than five years under such rules and regulations as the Legislature of the said State shall prescribe, and until such time as the Legislature shall prescribe such rules, these and all other lands granted to the State shall be leased under existing rules and regulations."

The existing rules referred to were those adopted by the Secretary of the Interior. One of the provisions which seemed to be urged as very important is rule 8, in regard to the renewal of a lease, which provided:

"In case a new lease is to be made at the end of the third year, the preference should be given the former lessee, if the Governor finds that he cultivated the land in a business-like manner and fulfilled the terms of the lease in good faith."

The rule was, however, modified by the act of the Legislature, effective May 26, 1908, which provided that if the land was deemed valuable for oil and gas, a lease should be made of the surface interest only, and that such lease "shall reserve to the State, its lessees

or grantees, the right to drill and operate oil and gas wells on such premises, and the easement, use and right-of-way to enter upon and fully enjoy the mining right reserved in this act."

Section 10 of the Enabling Act expressly authorized the Legislature to make rules governing the leasing of lands for agricultural purposes.

The word "may" in the clause, "if sold, may be appraised and sold at public sale," should probably be construed as "must," because the latter part of this section contained the following proviso:

"Provided, That before any of said lands shall be sold as provided in Sections 9 and 10 of this act, the said lands and improvements thereon shall be appraised," etc.

Congress evidently did not intend to lodge a discretion with the State as to whether said lands should be appraised, because of the later inhibition prohibiting a sale without appraisalment.

We have argued the proposition that Price was not preferred in the purchase of a mining lease upon the land under the act of Congress and the acts of the Legislature, and applied what we think is the correct rule of construction. Where a word is used in a statute in a definite sense, it will always be presumed to have been used in the same sense where ever the word occurs. In section 8, it is obvious that the word "sold" was applied only to the sale of the fee of the land, and not the sale of oil and gas mining leases. When the word occurs in section 10, it would be presumed to have had the same

meaning, and when it is provided that the land shall be sold, it would be presumed that it meant when the fee of the land was sold.

In 2 *Lewis' Sutherland Statutory Construction*, section 399, it is said :

"A word or phrase repeated in a statute will bear the same meaning throughout the statute unless a different intention appears."

In 25 *R. C. L.*, 994, the rule of construction is stated as follows:

"In addition to considering the independent, technical, and popular meanings of a word used in an act, other sections of the same act may be resorted to as an aid to determining the sense in which the word is used, and a word repeatedly used in a statute will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is another meaning intended. Where a word susceptible of more than one meaning is repeated in the same act or section of an act (either meaning being in each case open to reasonable adoption), a presumption arises, more or less forcible according to the circumstances, that it is used throughout in the same sense."

In *Ryan v. State*, 174 Ind., 464, it is said:

"When the same word or phrase is used more than once in the same section of an act, and the meaning is clear as used in one place, it will be construed to have that meaning wherever used in said act or section unless there is something therein to show that there is another meaning intended."

But an analysis of section 10 of the Enabling Act

conclusively discloses that the sale of lands therein provided, did not embrace a sale of the mineral, timber, stone, and sand, though these elements may be constituents of the land. Section 10 provided, among other things:

"That before any of said land shall be sold as provided in sections nine and ten of this act, the said land shall be appraised * * * and said appraisers shall make a true appraisal of said land at the actual cash value thereof exclusive of improvements and shall separately appraise all permanent improvements thereof at their fair and reasonable value, and in case the lease-holder does not become the purchaser at said sale, shall, under such rules and regulations as the Legislature may prescribe, pay to or for the leaseholder the appraised value of said improvements and to the State, the amount of the bid for said land exclusive of the appraised value of the improvements."

It is clear that if the land was sold under section 8, which permitted leasing for minerals, the law did not require that improvements should be appraised, and therefore the sale permitted in sections 9 and 10 alone recognized the passing of the fee which entitled the settler to take at the highest bid. The sale of mineral is provided by section 8 and is expressly excluded by section ten in the following:

"That before any of said land shall be sold as provided in sections *nine* and *ten*, the said land and the improvements thereon shall be appraised."
(Italics ours.)

This clause recognizes that the only "sale" author-

ized is found in sections nine and ten, and not in section eight.

Again, section 8 contemplated that the whole surface would not be required for the operation of mining leases, and the agricultural lessee should be paid "for all damage done to the agricultural lessees' interest." It did not require the appraisalment of all of his improvements and payment for the whole by the mining lessee. Section ten, however, requires that the lessee, if he fails to take the land at the sale, shall be paid for the *whole value of his improvements*. Then the sale provided for by section 10 must be one that entirely appropriates the improvements and takes exclusive possession of the premises, and necessarily is a sale of the fee, while section 8, whether the mining lease passes an interest or not, does not require the payment for any improvements but only for the damages occasioned.

This was a practical distinction. Mineral leases expire, and if the mining lessee is required to buy the improvements, he obtains no right to the use of the surface for any other purpose than mining and is not entitled to collect the value of the same from the purchaser at any later sale so that the investment becomes a total loss. Again, a mining lessee might only use a small portion, for instance an acre of the lease, but if he must buy improvements on the 159 acres which are suitable only for farming, and which he is not permitted to engage in, he loses the amount invested in the improvements.

Therefore we assert that the mining leasing was not a sale, no preference rights are granted and none of the requirements relating to a sale is imposed. The limitation prohibiting a purchaser from buying more than 160 acres, does not apply to the mining provisions because a responsible person may acquire an unlimited acreage for mining purposes.

The preference right to purchase was limited by Section ten to one hundred and sixty acres, but this limitation did not apply to the leasing for minerals. If a mining lease was sold for a section at a bonus, the agricultural lessees' right being limited to a quarter section, could not determine the part of bonus applicable to his leasehold.

From these sections, construed as a whole, it is apparent that Congress granted certain lands to the State to be held in fee simple with certain restrictions thereon. The important restriction was that lands valuable for mineral purposes should not be sold for a definite period, but might be leased for minerals, and that the Legislature might prescribe additional legislation governing such mineral leases, and providing that there should be no preference right given to an agricultural lessee for the purchase of such mining lease, that it should be sold at public sale and the lessee should only have the right to take the land at the highest bid at the time of the sale. If the leasing for mineral carried such an estate, that it will be regarded as a sale, the Enabling Act provided for two classes of sale, one of which was a sale of the fee and the other was the sale of the min-

eral. In the latter case the agricultural lessee had no preference right to buy.

The act further provided that the lands might be leased prior to such sale under the rules and regulations prescribed by the Legislature of the State. The Legislature prescribed rules for the leasing of said lands, both for mineral and agricultural purposes, and the Price lease was made under these rules and regulations on the 2nd day of January, 1913, by the State of Oklahoma and William T. Price, a copy of which appears at page 26 of the record. Price expressly agreed to the terms of the lease, and expressly agreed that he took only the right to the surface. At page 28 of the record is a clause in this lease, as follows:

"The said party of the second part (W. T. Price) hereby agrees, binds, and obligates that he is leasing said lands for agricultural and grazing purposes and that he will use and occupy the same for no other purpose."

It is also apparent that under this Enabling Act the State could not sell to Price this land unless the same had been offered at public sale and the high bid had been procured. If the State could not give this right even by its most solemn legislative sanction, we have never been able to understand how it could be contended that a court could enter a decree that would accomplish this result. The Supreme Court of the State held that it could not be done, and until the land was sold and "a high bid" had been obtained and Price had elected to take it under that bid, he could acquire no right or interest in or to the land.

The Legislature in its rules and regulations governing the disposition of its lands provided, in section 3 of the Act of May 26, 1908, as follows:

"The oil and gas interest described in this act in such lands may be leased by the Commissioners of the Land Office for oil and gas purposes to the same extent and in the same manner as a private owner of lands in fee could, in his own right, execute a grant thereto, subject, however, to the following limitations."

The limitations were substantially the limitations provided for by the act of Congress. These limitations were necessarily the same up until the first day of January, 1915, and the Legislature was continuing said limitations beyond said period. Under these sections of the Act of Congress, it must be clear that Price never obtained any interest in this land, or to the oil and gas thereunder. Not having any interest in the same, we have always insisted that he had no right to ask any court to construe these acts with reference to the right of the State to dispose of the mineral interest therein. If the State owned the oil and gas rights, and Price had no interest therein, how can Price be heard to challenge the manner in which the State sees fit to dispose of them?

Fee Farm Rent.

Both counsel in their brief have discussed at some length the old rule of fee farm rent. We do not care to discuss this question at any length. It is a principle that has not been applied generally in the United States,

and one wholly inapplicable to the condition created by the Acts of Congress which we have examined. A condition precedent was created by these acts before the preference right became operative. It is almost absurd to say that Congress in 1904 reserved certain lands for school and other purposes, to be held by Congress until the State had been formed, and then to grant such lands to the State and in the face of these acts claim that Congress did not grant them to the State, but granted them to the lessees in possession.

By acts of the Legislature the Commissioners fixed the rentals and by their benevolence the lessees procured these lands with a little trifling rental of 4 per cent on their appraised value. This 4 per cent was less than the average taxes which were paid by the other landowners of the Territory and State. But at no time did Congress or the State ever attempt to give any right to re-lease the lands in perpetuity. It was provided that in case the State desired to re-lease them and the lessee satisfied the Governor of his good faith and good husbandry, the lessee should have the preference to said renewal. Price never claimed that he attempted to satisfy the Governor in this regard and the Legislature saw fit not to renew such leases, but provided that if they were valuable for mineral, that a lease only of the surface might be made.

But the amount of the rentals were unfixed by law and subject to changes at any time by an order of the Commissioners of the Land Office. The claim of the right in perpetuity is based upon a possession

dependent upon the landlord desiring to renew a lease, dependent upon satisfying the landlord that he was a proper tenant and acting in good faith, and dependent upon the parties agreeing upon the annual rental. It is impossible to fix a tenure, in nature of "fee farm," under such indefinite conditions.

Governor Steele, the first Governor of Oklahoma, prepared and submitted to the Secretary of Interior certain rules governing the leasing of certain lands. An excerpt of his letter appears at page 190 of the record, and is as follows:

"It seems there ought also to be a clause giving the lessee preference, where a new lease is to be made, at the end of the third year, if one is made, provided he has cultivated the land in a business-like manner."

He submitted ten proposed rules which were subsequently adopted. Rule 3 provided as follows:

"Sealed bids shall be received after proper public notice to be given in the manner deemed by the Governor the best practicable under the circumstances, and the lease to be awarded to the actual bidder at the highest amount of rent bid in each case."

Rule 8 provided:

"In case a new lease is to be made at the end of the third year, the preference shall be given the former lessee, if the Governor finds that he cultivated the land in a businesslike manner, and fulfilled the term of the lease in good faith."

These rules continued in force until the State Leg-

islature passed the Segregation Statute in 1908. On March 22, 1909, a general act was passed providing for the leasing of lands. The provisions which we desire at this time to call attention to are Sections 4 and 5, Article 1, of Chapter 28, of the 1909 Session Laws. Section 4 provided for the leasing of public lands which would embrace Sections Thirty-three in the State, but provided that the amount of the rental should be fixed by the Commissioners of the Land Office. Section 5 provided that a sworn application should be made by each lessee, accompanied with willingness to pay "such rental as the Commissioners of the Land Office may fix."

It will be observed, therefore, that under the rules of the Secretary of Interior in force during the Territorial Government, no fixed rental was provided for, but the lessee was permitted to take the lease at the end of three years at the highest bid that might be offered for the particular tract of land. This rule continued in force until the passage of the Act of March 22, 1909, which provided that the Commissioners of the Land Office should fix the rental and that the land might be re-leased to the tenant in possession upon the filing of a sworn application asking for permission to lease the land and showing that he was the head of a family, above the age of twenty-one, and expressing a willingness to pay the rental to be so fixed.

There were no provisions giving a preference right to lease these lands except by implication, but we are willing to concede that the fair implication of this Act

was that the lessee in possession, coming within the terms of the Act, was entitled to re-lease the land.

It is an obvious principle of law, however, that no contract is created to perpetually lease lands whenever the owner reserves the right to lease or not, and the lessee does not stipulate to take for any definite period, and the amount of rental is not determined. The lessee, of course, could not agree to take the land indefinitely, because he could not in advance determine whether he could accept a tract of land from an owner who had the right to arbitrarily fix the rental. Besides, his preference right was not a right which obligated the State to lease the land to him, but merely gave him a right to be preferred as to other applicants if the State did lease the land.

Lessees' Preference Right.

The preference right accorded the agricultural lessee to purchase the land at the time of the sale of the fee, is not a vested right.

In *Hutchings vs. Low*, 82 U. S., 77, referred to by plaintiff in error as controlling, this court said:

"Such claim, it must be remembered, is only a claim to be preferred in the purchase of lands of the United States in limited quantities, at fixed price, when the lands are offered for sale in the usual manner. When one has acquired this claim, by complying with the conditions of the law for its acquisition, he has a legal right to be thus preferred, when the sale is made, as against others asserting a similar right under the law, which the

court will enforce in proper cases. But the claim of pre-emption, as already said, can never arise when the law does not provide for the sale of the property. Until thus sanctioned by the law, the claim is stated by the court in that case (*Lytle vs. Arkansas*, 9 How., 333) has no existence as a substantial right."

Again, it is said:

"The whole difficulty, in the argument of the defendant's counsel, arises over his confounding the distinction made in all cases whenever necessary for that decision, between the acquisition by the settler of a legal right to the land occupied by him as against the owner, the United States; and the acquisition by him of a legal right, as against other parties, to be preferred in its purchase."

Applying this last statement of the law, we can easily show the invalidity of Price's claim. Price would be preferred to all other purchasers, and this would be the extent of his right. There was no other purchaser, because no bid had ever been received; therefore his preference right had not come into operation.

In *Russian-American Co. vs. U. S.*, 199 U. S., 570, is found a recent clear expression of this court. It is said:

"We have had occasion, in several cases, to hold that, although the occupation and cultivation of public lands, with a view to pre-emption, confers a preference over others in the purchase of such lands by the bona fide settler, which will enable him to protect his possessions against other

individuals, it does not confer a vested right, as against the U. S. in the lands so occupied. Such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and a receipt from the proper land office given to the purchaser. Until this has been done, it is competent for Congress to withdraw the land from entry and sale, though this may defeat the inchoate right of the settler."

In *Frisbie vs. Whitney*, 9 Wall., 187, it is said:

"When this payment is made and other prerequisites having been complied with, the settler is then entitled to a certificate of entry from the local land office, and, ultimately, to a patent."

Mr. Justice Field, in *Hutchings vs. Low*, 15 Wall., 77, uses this language:

"It seemed to us a little less than absurd to say that a settler, or any other person by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires the right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition."

At page 27 of Sharp's brief, under the subhead "Questions Presented," we find a remarkable basis for their claim of title to the property in controversy. They say:

"This record presents then, clearly and unequivocally, and it is the desire of all parties so to do, the question—

"1st. As to what right, if any, was granted by the Enabling Act, section 10, to the lessee hold-

ing the lands granted by that act to the State, by his 'preference right of purchase.'"

We insist that the "preference right to purchase" can arise only at the time of a sale, and, as no sale has ever been ordered, of this property, a definition of the term is not decisive of this controversy.

Counsel then states, as his second question, the following:

"2nd. Were the rights so granted such rights as, when accepted and relied upon by the lessee, could not be impaired, taken, or avoided by the State, as by its Legislation (Appendix 'B' herein), without violating the Constitution of the United States?"

Again, the question presented is wholly irrelevant. What rights the lessee would have had, if the sale had been made and he had accepted and relied upon the law by tendering the purchase price, is not material, because it is obvious that the State of Oklahoma would have given him title, and no question could now be presented to this court. "Appendix B," referred to by counsel, is the act prohibiting the sale of the land, so that the lessee could not have accepted the conditions of a sale not made, and one which, under the law, could not be made.

Counsel's third question is stated as follows:

"3rd. Were the rights granted to Price, lessee, by the Sale Statute (Appendix 'C'), such rights as, when accepted and relied upon by him, could not be subsequently impaired by the State, or its Commissioners acting under the authority

of the State, and particularly by their 'deeming' the land valuable for oil and gas purposes (under Appendix 'B'), on August 26, 1915, without violating the Enabling Act and the Constitution of the United States?"

There is a combination of errors put into this question. First, the law providing for the segregation of this land was passed prior to the act authorizing its sale, and the sale statutes, therefore, do not authorize the sale of any land valuable for minerals. Neither the Enabling Act, nor the Constitution of the United States, require any sale of the property, but the Enabling Act lodged with the State the discretion of holding or selling the property. If it was to be sold, it could only be done under the provisions of the Act of the Legislature. These acts of the Legislature have been construed by the highest court of the State and that court has said that such land could not be sold. It was not only so stated in the decision of the case at bar, but also in the case of *Roma Oil Company vs. Long* (Oklahoma), 173 Pac., 957. We have shown, in our motion to dismiss, that the construction of the State statute, by the Supreme Court of the State, will be accepted as a correct construction in this court.

The fourth inquiry is, as follows:

"4th. Were the rights held by Price, as lessee, under the Enabling Act and the Sale Statute (Appendix 'C'), and the Constitution of the United States such rights as could not be impaired, avoided or taken by the State as by Statute (Appendix 'B'), and the authority exercised by the Commissioners, thereunder, in executing the

oil and gas lease to the Magnolia Company, January 4, 1919, without violating as to Price, the Constitution of the United States?"

We think the argument of Mr. Justice Field, in the *Yosemite Valley case*, is very pertinent, when he said:

"It seemed to us a little less than absurd, to say that a settler, or any other person by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires the right to compel the owner to sell or such an interest in the property as to deprive the owner of the power to control its disposition."

But the rights held by Price have, in no way, been impaired or avoided. His right was to use the surface for agricultural purposes, or, in case of sale, to take the property at the highest bid. All these rights are respected by the decision of the Supreme Court of Oklahoma.

The fifth inquiry is as follows:

"5th. Summarizing, was the act of the Legislature of 1908 (Appendix 'B') constitutional as to Price, and this particular land, and were the proceedings of the Commissioners thereunder—

"(a) in 'segregating' this land by their 'deeming, resolution on August 26, 1915, and

"(b) in leasing it for oil and gas purposes on January 4, 1919 (while held and possessed by Price under the Enabling Act and Sale Statute of 1909), (Appendix 'C') constitutional?"

As we have shown, the Enabling Act did not provide for any sale of the land, but merely imposed certain restrictions upon the sale, in case same was made,

and we are compelled to look to the State laws to determine whether the same should be sold. The Constitution of the United States, of course, has no application to either of these questions. It is merely an effort to insist that some Federal question is involved, and clearly shows that no *bona fide* Federal question is presented, and the appeal should be dismissed. If, however, we are mistaken in this, there is no possible question that can arise involving the constitutionality of a sale statute, until some sale is made, or some act has been done, under such statute, which tends to deprive somebody of some vested right. Until the sale is made, the land could be leased, either for oil or gas, or be leased for agricultural purposes. Following these discussions, counsel has, at page 30, Sharp's brief, enumerated many of the contentions of Price. The very basis of his contention, as shown on page 29, is as follows:

"The defendant Price contends that the Enabling Act, section 10, gave the State only limited authority over said land, such authority being

"1st. To hold it as a trust estate, or

"2nd. To sell it as a trust estate."

There was, of course, no intimation that the State should sell this land as trust estate. The direction was that the State should sell and the proceeds should be held in trust.

It is then further stated:

"That if the State elected to hold the land and lease it, the land could be leased

"1st. For 'periods' not exceeding five years:

2nd. Under 'existing rules and regulations' (which appear in Record, at 133-134 with letter of Governor Steele, 129-133),

until the Legislature presented new rules, (Enabling Act, section 10), *which it did not do.*"

The above italicized by us is an erroneous statement as is shown in "Appendix B," an act which expressly regulated the manner of leasing and contained the rules and regulations governing the same. Section 2, of this act, reads as follows:

"Each agricultural, timber, grazing or other lease to any surface interest in the deposits segregated, as provided in section one hereof, and further reserve to the State and its lessees and grantees the right to drill and operate oil and gas wells on such premises, and the easement use and right of way to enter upon and fully enjoy the mining right reserved in this act."

This was a definite rule and regulation, and it was under this rule and regulation that the lease was made to Price.

Counsel further states, commencing at page 30:

"The defendant claimed that under the Enabling Act, section 10.

"1st. A preference right of lease and release that insured him secure tenure and exclusive possession, so long as the State elected to lease, and not to sell."

A preference right to lease and release did insure a secure tenure to the lessee. This tenure, however,

was that he should have the use of the surface of the land, but should have no right or interest in the mineral, and should not, in any way, interfere with the operations of the State, or its lessee, in the production of oil or gas. He had no exclusive possession, because a dominant right to use the surface for mining was expressly reserved by the law, and by the terms of his lease. He did not, however, have the right to release the property, as long as the State elected to lease it, because the original rule referred to authorized the releasing, provided as follows:

“In case a new lease is to be made at the end of the third year, the preference should be given the former lessee if the Governor finds that he cultivated the land in a business-like manner and fulfilled the terms of his lease in good faith.”

When he asserted title against his landlord, he was not acting in good faith and lost his right to release the land. It would have been only the right to release one time, because the rule expressly provided that, at the end of the *third year*, a preference should be given to the former lessee. This right to renew the lease is very indefinitely allowed, if allowed at all and, the preference right to renew the lease, like all preference rights, gave no right against the owner but merely the right to be preferred to other persons offering to lease same. Of course, the preference right to release was conditional upon the lessee satisfying the Governor that he had farmed the land in a husband-like manner and acted in good faith.

In his second contention, found at page 31, Sharp's

Brief, he alleges that the preference right to purchase always existed, but that it was unenforceable until the State's election to sell. This is a clear mis-statement of the language and meaning of the Enabling Act. The Enabling Act did not provide that *when the State elected to sell* that the lessee should have the preference right, but it provided that *at the time of the sale*, he had such preference right, and whether or not the State passed a law authorizing the sale of the land, would be immaterial in determining whether Price owned the land, because it required a sale, and the *exercise* at such sale of a preference right to purchase before Price became interested in the title of the land.

In this connection, it might also be urged that plaintiffs in error disclose, in their brief, that the land could not be sold, even though it had never been segregated. See "Appendix C," found at the end of Sharp's Brief. In section 15 of this act, approved March 2d, 1909, the Legislature of Oklahoma provided:

"Section 15. All the lands not leased, described and enumerated in section 1 of this act. shall be opened for sale immediately upon the appraisement of the same as provided in this act and by law, and all of said lands offered for sale under the provisions of this act that are leased shall be sold upon the expiration of each lease contract, or sooner upon petition of lessee to the Commissioners of the Land Office, asking for sale of any of said lands so leased."

Section 4 of this act provides for a review of any appraisement made, and, in a proper case, authorizes the Commissioners to make a re-appraisement. The

Commissioners were required to serve copy of appraisal on the lessee so that the lessee could by appeal preserve his right, but from the fact that De Arman owned the lease of record and Price was in possession claiming same, the service was not made. Price recognized this situation and took an agricultural lease, found at page 26 of the record, dated January 2nd, 1913, which ran for the period of two years, expiring on the 31st day of December, 1914. On the 6th day of March, 1915, the Commissioners of the Land Office executed an extension certificate, which was accepted by Price, as found on page 32 of the record. This certificate extended the lease to the 31st day of December, 1915. Price testified that he was present at the sale of various lands held in Stephens County in 1910-11, when other lands in that county were offered, and, at that time, he made a demand. It will be noted that, at that time, Price was holding under an unexpired lease held by DeArman. At page 56 of the record, is an extension agreement, showing that the De Arman lease expiring on the first of January, 1909, is extended to the first day of January, 1910. Assignment or relinquishment of this lease was executed by De Arman on the 15th day of October, 1909, but Price's evidence discloses that this assignment was placed in a bank, and remained there for approximately nine months.

Price testified, commencing at page 136 of the record, that he sent DeArman's relinquishment to the Commissioner of the Land Office, but that he was not satisfied with the appraisal, and that the new appraisal, which he consented to was made on the 30th day

of August, 1915. (See Rec., page 149.) It would be obvious, then, that, under the law, Price acquired no right to even compel the sale of his property. The Commissioners of the Land Office could arbitrarily order a new appraisal, and when Price complained, though he did not appeal, as provided by the statute, they ordered a new appraisement, but, before the new appraisement was made, the land was segregated. Price claimed that when the general sale was made in 1910, he went out and demanded that his property be sold, but his land could not be sold, because the same was not advertised and no appraisement had been made and accepted by the parties in interest.

It will be observed, also, that, subsequent to this purported demand for sale, to-wit: On the 2d day of January, 1913, Price took a lease on this tract of land, expiring on the 31st day of December, 1914. However, before this appraisement was made in 1915, as appears from page 149 of the record, to wit, on the 26th day of August, 1915, the land was segregated for mineral purposes. It must be apparent, then, that, under the law, the land could not be sold until it was appraised, and that, prior to its appraisement, it had been segregated, and, under the law, could not be sold at all.

These are matters governed by the laws of the State, and the Supreme Court of the State has held that, under these laws, no sale could be made. The act of Congress only provides *that in event a sale was made*, Price should have a preference right. The laws of the State prohibiting the sale, and the State officers, acting under those laws, did not make a sale, and we are un-

able to conceive how it can be said that any act of Congress, or any provisions of the Constitution of the United States, were violated.

Counsel at page 110 of Sharp's brief, say:

"Price denies the Commissioners' rights to make the oil and gas lease; about this there seems no reasonable ground for doubt. He is in no position, then, to take an oil lease on what he claims as his own land, or on land which he has a right to acquire and own."

From this excerpt it is obvious that there is no claim made to the oil and gas mining lease, so that the construction of the term "sale" loses much of its importance. But in the next breath counsel attempt again to reassert in an indefinite way Price's right to the oil lease. At page 111, Sharp's brief, he says:

"The Enabling Act, section 10, requires of the Legislature that the lessee be given the preference right to purchase 'under the rules and regulations as the Legislature may prescribe.' The rules and regulations prescribed for oil leases (Appendix 'B') may be searched in vain for compliance therewith. It neither gives nor recognizes any preference."

This is a correct statement of the Segregation Statute. No preference right was given to the lessee. But section 10, which gave the preference right, only gave it when a sale of the legal title was made, and therefore the Act of Congress did not require that any preference right should be given when an oil and gas mining lease was sold. In fact, section 8 prohibited the giving of such preference right and

required the land to be sold to the highest and most responsible bidder.

Counsel then, at page 111 of Sharp's brief, at some length have suggested that if the State could sell the oil rights at one time and sand and rock at another, and the water and timber at another, that the value of the property would be destroyed and that the preference right would be without value. It may be that the preference right would be without value if the land was sold, because the bid might exceed the value of the land, but the lessee was given the right to decide whether he wanted it or not, and he was not required to take the land but merely had the privilege of taking it if he regarded the land of greater value than the price offered.

Counsel take exception to our statement found in line 26 at page 14, supporting motion, to dismiss, in which we stated that the Enabling Act prohibited the sale of this land in 1909, at the time of the passage of what is termed the Sale Statute, and we reassert this absolute truth. The Enabling Act prohibited, until January 1, 1915, the sale of any land valuable for oil and gas, and this land was valuable for oil and gas, and therefore it could not be sold. The Legislature, before the expiration of the limitation in the Enabling Act, further provided by the Segregation Statute, that it should not be sold.

The Segregation Statute.

The Segregation Statute passed by the Okla-

homa Legislature at the session of the first State Legislature, found in Sharp's brief as "Appendix B," in part provided:

"When any tract of the school lands and other public lands granted to the State of Oklahoma under the act known as the 'Enabling Act,' is by the Commissioners of the Land Office of the State known to contain oil or gas, or where such lands are by said Commissioners deemed valuable for oil and gas purposes, such Commissioners shall enter of record in their office, their findings, declaring that such oil or gas character exists, and further declaring that the oil and gas deposits are segregated from the surface use and interest therein, and such segregation of such deposit shall conclusively withhold the same from sale, lease, or other alienation, except as provided in this act."

This act is challenged for three reasons: First, that it was a delegation of legislative powers; second, it was indefinite, permitting the segregation when the commissioners "deemed" the land valuable for oil or gas; third, that it was repealed by the later act ordering the sale of the land.

There is a clear distinction between the delegation of power to make a law and the conferring of the authority to inquire into a state or condition upon which the law shall operate. Congress alone can pass legislation providing that bridges shall not be constructed over navigable rivers so as to interfere with commerce between the States. But Congress may authorize the Secretary of War to determine what rivers are navigable and what height above the water

the bridges shall be built so as not to interfere with the navigation.

In *Union Bridge Co. vs. U. S.*, 204 U. S. 364, it is said:

"Congress when enacting that navigation be free from unreasonable obstructions arising from bridges * * *. may, without violating the constitutional prohibition against delegation of legislative or judicial power, impose upon an executive officer the duty of ascertaining what particular cases come within the prescribed rule."

Again, Congress may pass tariff laws fixing the duties exacted, but providing that the rates shall not apply to nations admitting certain of our exports without taxation, and may authorize the executive department to determine what nations come within the exception. The executive does not legislate, but merely determines the fact upon which the legislation operates.

Field vs. Clarke, 143 U. S., 649.

Judge Sandborn, in *St. L. U. Bridge, etc., vs. The U. S.* 188 Fed., 191 said:

"A Legislature may delegate to an executive or administrative officer the power to find some fact or situation upon which the operation of the law is conditioned."

Justice Lurton, sitting on the Sixth Circuit, had occasion to examine this question in the case of *Coopersville C. Co. vs. Lemon*, 163 Fed., 145, and uses this language:

"That the delegation of authority to add to or take from a law would be to delegate legislative power must also be conceded. But that Congress may enact a law and delegate the power of finding some fact or state of things upon which the operation of the law is made to depend is equally clear."

In re Kollock, 165 U. S., 526.

Dunlap vs, U. S., 173 U. S., 65.

It is proper to inquire what constitution prohibits the Oklahoma Legislature from conferring the power of determining what lands are mineral on the State Commissioners of Public Lands of Oklahoma. The Oklahoma State Constitution? If so, it has been construed by the Supreme Court of that State, and its construction would be accepted by this court. It is a state question and not properly reviewable in this court. The Supreme Court of Oklahoma, not only in the decision of this case below, but in other cases, has held that such legislation is not the unconstitutional delegation of legislative functions.

Insurance Co. vs. Welch, 49 Okla. 620.

The second objection is unsound. The word "deem" has the well-understood meaning when applied to administrative boards or judicial or quasi-judicial tribunals. It usually means "adjust" or "determine."

In the case of *Town of Checotah vs. Town of Eufaula*, 31 Oklahoma, 85, it is said:

"One meaning of 'deem' is to judge."

In *State vs. Cohen*, 73 N. H., 543, it is said:

“ ‘Deem’ does not signify an arbitrary exercise of will, but a deliberate exercise of judgment. To ‘deem’ is to think, judge, hold as an opinion, decide, or believe on consideration.”

The Federal courts frequently define the word “deemed” as the equivalent of “to adjudge.” *Leonard vs. Grant*, 5 Fed., 11, 16; *U. S. vs. Doherty*, 27 Fed., 730, 734.

The third objection is equally untenable. The segregation statute was passed at a time when no statute had been passed authorizing a sale. The Legislature was contemplating a sale because pending at that time, and passed (April 8, 1908) by the same Legislature, was a complete act providing for an appraisalment. (See Appendix A to Sharp’s brief.)

The act of Congress required an appraisalment before sale and the Legislature was providing an appraisalment in order that certain of the lands might be sold. But in order to prevent its mineral land from being sold, and prior to the passage of any law permitting the same, the Legislature passed the Segregation Act, which required that the commissioners should segregate all lands known or deemed to be valuable for oil or gas. It was necessarily anticipating subsequent legislation directing a sale. When the sale was ordered by the Act of March 2, 1909, it was expressly provided that none of the lands should be sold that had been reserved by the Enabling Act or other acts of Congress or any act of the Legislature.

The Act of 1909, providing for the sale of public buildings land, was a part of the general plan of disposing of the public lands of Oklahoma. It adopted the appraisement previously made and recognized the rights conferred by the previous acts. It was intended to fit in and be a mere complement of the other legislation upon this subject. It was not intended in any sense to repeal the provisions with reference to the leasing of mineral lands. The proviso found in the first section, which prohibited the sale of lands known to be *mineral*, did not in any way attempt to provide for the leasing of such lands for the production of their *known* mineral. The Legislature had in mind that a complete system had been provided by the act of May 26, 1908, and, without any intention of modifying or repealing that statute, left the mineral lands to its operation.

However, we may again assert that whether the Act of May 26, 1908, was repealed by the Act of March 2, 1909, involves the construction of the Act of 1909.

The Supreme Court of Oklahoma has construed the Act of March 2, 1909, and held that it did not operate to repeal the provisions of the Act of May 26, 1908, known as the Segregation Act. This construction was necessary, in the decision of the court in the holding that the laws of Oklahoma authorized the segregation of the land in controversy deemed by the Commissioner to be valuable for oil and gas. This court, as we have frequently said, will accept that construction.

The provision with reference to segregation found in the first section of the act was one of practice, convenience, and notice. The first section did not in any sense limit the right of the State to the control of its oil and gas in its own lands, but it provided a method by which the lessees might know and the State might designate lands valuable for mineral purposes. The next section expressly shows that this is a correct construction, because it then required the State to make leases with the lessee for the surface of such lands reserved or segregated. There can be no contention that the State lost any of its minerals by mere delay in segregation, because it was the owner in fee and had the right to lease its land the same as any other owner in fee, at any time for mining purposes, but as some of the lands were to be ordered sold the State was withdrawing lands known or deemed valuable for oil and gas, and precluding the sale of such lands. Nor can it be contended that there was any particular time in which the order of segregation was required to be entered in the record of the Commissioners, because the statutes provided that *when* any tract is known, or *where* such lands are deemed valuable. *When*, in the sense that it was used there, followed by the verb *is* (in the present tense), means that whenever the knowledge is possessed. "When" used with reference to a fact, carries the continuing idea that when the present is moving by the passage of time, that the power is moving also by the passage of time. The word *where*, however, does not refer to time, but refers to the existence of certain circumstances. These circum-

stances may have existed yesterday and may exist today, or may come into existence at any time in the future.

Again, the expressions "when it is known" and "where it is deemed valuable," are expressions, when construed together, convey a distinct idea. 2nd Bouv. L. Dict., page 1227, defines *when* as "at the time." Then, the expression "when it is known" means "at the time that it is known." The expression "where deemed valuable," carries the idea "*if* deemed valuable," and has no reference to any limited time, and many cases can be found construing the words *if* and *where*, when relating to the existence of certain circumstances, as meaning substantially the same as *when* or *whenever*.

See *Campbell vs. Milliken*, 119 Fed., 982, 986.

In the case of *Swink vs. Anthony*, 107 Mo. App., 601; 81 S. W., 915, 916, the word *where* is construed in its application to circumstances that have, may or will occur, as meaning *if*.

In the case of *Ex Parte Boyd*, 50 Tex. Crim. Rep., 309; 96 S. W., 1079, 1080, **where** is construed, in an expression providing: "That where advisable in the opinion of the judge of the district court, etc," as meaning at the time when he may deem it advisable. This is exactly the sense in which the term is used in the statute we are considering. The statute says that at the time that the Commissioners may know or at the time when they may deem it valuable, the lands shall be segregated, and follows with the proviso

that leases shall then be made of only the surface. Then we have a grant of this land to the State, with absolute dominion over the same, with certain limitations as to the manner and price of sale, with the proviso, however, that mineral lands should not be sold for a fixed period of time, or such further time as the Legislature might prescribe.

We have an act of the Legislature of 1907-8 granting to the Commissioners of the Land Office the power and right to lease the land for oil and gas to the same extent and in the same manner as a private owner of land in fee might in his own right execute a grant to his land, with the additional provisos found in the first two sections, that at any time that it was known or deemed valuable, public notice should be given of their conclusions by entering in their record their finding, which automatically withdrew the land from sale and required all lessees to take notice of such condition. This power was further continued and this construction given further emphasis by the Legislature of 1917. Senate Bill No. 181, found in the Session Laws of the Sixth Legislature (1917), at page 462, in effect recodified the laws with reference to the leasing of public lands for oil and gas purposes. Section 1 of this act removed all uncertainty as to the construction to be given to these adverbs, by the following expression:

"The Commissioners of the Land Office are authorized to lease for oil and gas purposes any of the school or other lands owned by the State of Oklahoma which such Commissioners may deem valuable for oil or gas, etc."

This clause authorizes the withdrawal of such lands, without reference to the time when the Commissioners might deem the same valuable for oil and gas. It is also a Legislative construction of the former act, by showing that it did not consider the adverbs *when* and *where* found in the first act as being of such character as to exhaust the power of such Commissioners or limit the time in which they might act, to any particular period of time. Of course the words "the Commissioners are authorized to lease, etc.," are commands, in the sense that it is the master directing its officers what to do. If the second section of this act further recognized the idea by the following:

"The Commissioners are empowered to segregate any of the school or public lands for mineral purposes which the Commissioners may, in order entered of record, determine to be valuable for oil and gas."

The record in this case showing the segregation by proper resolution, and the execution of an oil and gas lease to the Magnolia Petroleum Company, the Magnolia Petroleum Company became vested with all of the right which any fee owner might give to operate upon his land for oil and gas, with the single proviso that the Magnolia Petroleum Company should pay the damages which were sustained to the surface by the agricultural lessee. This payment was offered in the petition and in Court, and was also offered at the time that the company made demand to go upon the property to locate its wells and commence its operations, but the defendants refused

to accept any compensation and refused to permit the Magnolia or its agents and employees to enter upon the same.

The brief of plaintiffs in error admit the order of segregation, admit the execution of the lease and admit that the plaintiff had refused to permit any development of the property, and allege as the excuse therefor that it would be in effect the denuding of the said land of its valuable mineral and depriving the plaintiffs of what they termed their right and title to the property.

This court, in the case of *Roma Oil Company vs. Long, supra*, has decided every question that can be reasonably urged by the plaintiffs in this case, adverse to their contentions. The first paragraph of the syllabus is as follows :

"In leasing school lands of the State for agricultural purposes, the State reserves to itself, its lessees and grantees under section 7196, Rev. L. of 1910, the right of entry to drill and operate oil and gas wells on said premises."

In the body of this opinion is found the following statement:

"The question for consideration is whether the oil company had the right to enter without the consent of the surface lessee and proceed to develop the premises under an oil and gas mining lease."

Discussing this matter further, the court said:

"Section 7196 expressly provides that agricultural leases of any surface interest in such

segregated lands shall reserve to the State, its lessees and assignees, the right to enter and drill and operate oil and gas wells. This severance is complete for all legal and practical purposes, and this act was in effect when the lease under which Long claims was entered into by the Commissioners of the Land Office. Being the law of the State, this reservation became part of the lease at the time of its execution. The lessees made their contracts with a common lessor, one taking the surface right, the other the right to prospect and develop oil and gas."

Further on it is said :

"Long had possession of the surface for agricultural purposes only. The right to enter and prospect for oil and gas was reserved to his lessor by statute. The oil company, as a lessee of the State, had the right of way to enter and prospect under section 7196 of the statute.

* * * This is a right to be exercised with due regard to the owner of the surface, and its exercise will be restrained within proper limits by a court of equity, if this becomes necessary; but, subject to this limitation, it is a right growing out of the leases made by the common grantor and the impossibility of reaching the oil and gas in any other manner."

The opinion then holds that the mineral lessee had the right to go upon the land and use so much of the land as might be necessary, and in case settlement had not been made, that he could only be enjoined when it was alleged that he was insolvent, or there existed other reasons which gave the court of equity jurisdiction in the matter. None of these

matters were alleged or claimed, and the injunction sought to take only such part of the land as was absolutely necessary, in order that the Magnolia Petroleum Company might enter upon the land and drill wells. The plaintiffs do not pretend to assert that the Magnolia are attempting any unreasonable appropriation of the land for such purposes, but deny that the Magnolia has any right to enter upon the land, or that the State had any right to make any lease upon the land.

We think the Segregation Act is entirely valid, and the overstrained argument against the validity by the plaintiffs in error adds to our conviction. But it would be immaterial whether the statute was valid or not. Under the Enabling Act the condition precedent to the State conveying this land to the agricultural lessee was, that after the obtaining of a high bid in a public sale duly advertised, such lessee must exercise his election to accept same. If the law be held invalid, which prevented the obtaining of such high bid, which would of itself prevent the lessee from making an election, title would not pass to the lessee. A condition precedent, whether valid or invalid, must be performed before title passes. If the condition precedent is prevented, even by an unlawful act, title does not pass.

Blackstone in his Commentaries, in book 2, page 157, states the rule as follows:

“But if the condition be precedent, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome

in a day, he shall have an estate in fee, here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant; for he hath no estate until the condition be performed."

In 4 Kent, page 125, the rule is stated as follows:

"A precedent condition is one which must take place before the estate can vest or be enlarged; as if a lease made to B. for a year, to commence from the first day of May thereafter, upon condition that B. pay a certain sum of money within the time, or if an estate for life be limited to A. upon his marriage with B., here the payment of the money in one case and the marriage in the other are precedent conditions, and, until the condition be performed, the estate cannot be claimed or vest. Precedent conditions must be literally performed, and even a court of chancery will never vest an estate, when, by reason of a condition precedent, it will not vest in law. It cannot relieve from the consequences of a condition precedent unperformed."

See also *Wellsville Oil Co. vs. Miller*, 44 Okla. 493 where the question is fully discussed.

We have not attempted to follow counsel in their labored discussion commencing at page 112, Sharp's brief, and concluding at page 121, in which they discuss our brief on motion to dismiss the appeal. Their statements are conflicting and incoherent, and are fully answered by merely reading the same.

At page 122, Sharp's brief, counsel commence the discussion of the term found in the Enabling Act, "of land valuable for mineral," and throughout several pages attempt to show that the land should be valuable for minerals at the time of the passage of the act, and that it was necessary that such minerals, or their value, be known at that time. A few cases are cited to support their argument which are wholly irrelevant. The cases cited are to the effect that if Congress or the Legislature authorizes the *selling of property*, but reserves lands valuable for mineral, and the Land Department makes selections of certain known mineral lands and directs a sale of the remainder, that title passes to those sold notwithstanding the same may subsequently be discovered to contain mineral. It would require no decision to establish this rule; or, else no sale of lands could ever be made.

If A. owns a piece of land and sells it to B., the rights to the land pass to B., notwithstanding the same may be valuable for mineral, and A. would not have sold the same had he known they were valuable for such purpose. If upon the other hand A. refuses to sell the land because he believes or even "deems" such land to be valuable for mineral, B. gets no right notwithstanding the same may ultimately prove to have no value. The decisions are to the effect that the Commissioners must make the selection before the sale, and refuse to sell.

The Secretary of Interior has been authorized in a great many cases to withdraw land from homestead

and preemption laws. Congress pass acts providing that certain lands may be withdrawn from settlement because of their value for the preservation of timber, or because they are valuable for mineral purposes, or because they are needed for park or other public purpose, and direct the Secretary of Interior to make the necessary investigation to determine what lands are necessary for such purpose and to withdraw the same from settlement and sale.

If the Secretary withdraws a tract of land and refuses to sell because desired, or valuable for any of these purposes, the settler cannot acquire rights to this land. If the Secretary's action in the matter is unlawful or unauthorized, he may be compelled by mandamus to sell same, though we know of no instance where the discretion of the Secretary in this regard has ever been reviewed by the courts. But whether his act be lawful or unlawful, title does not pass to the land without a sale. If, however, the Secretary determines that a certain tract of land is not valuable for mineral and sells the same, title passes to the land and the mineral rights become vested in such purchaser. It is immaterial that the Secretary discovers that the land is valuable for mineral, unless, after such discovery, the land is reserved from sale.

It therefore seems entirely inappropriate to cite cases which merely hold that when the Secretary has sold land without any reservation of mineral, that he cannot afterwards claim that because such

land has proven to be valuable for minerals that the sale is void.

Counsel, at page 137, Sharp's Brief, referring to the decision of the Supreme Court, say:

"The opinion held out words of hope in virtuous language, and delivered destruction in its decision and order."

It requires but very little effort to give "hope" to these plaintiffs. Wherever this court, or any other court, in construing a state of facts, however different, have decided that the owner was required to make the conveyance, counsel have considered same a precedent and have attempted to distort every feature of this case to give it some likeness to those decided by the courts; but the line of demarkation has been so clearly stated, and so often repeated, that an owner can only be deprived of his land by a sale or contract of sale, that it would seem that hope would cease to abide eternally in their breasts.

At page 137, Sharp's Brief, counsel finally state the crux of plaintiffs' case by the statement that the Segregation Statute was passed May 26, 1908, and the Sale Statute passed March 2, 1909, and then says:

"The two statutes cannot coexist."

And on the following page say:

"Hence this case presents a question of the constitutionality of the Segregation Statute."

We must assume that they meant constitutional under the Constitution of Oklahoma. At the time the

Segregation Statute was passed the Sale Statute which they referred to had not been enacted. They admit that the State did not have to sell, and, if that, was true, undoubtedly they must also admit that the State was permitted to lease for mineral. If the State had not elected to sell at that time and passed a law directing the leasing for mineral, we hardly see how they could look the court in the face and say such leasing act, which is the Segregation Statute, was invalid and, if invalid, undoubtedly did not conflict with any act of Congress and would be invalid only because in violation of the Constitution of Oklahoma.

The State court in construing the Segregation Act and holding that the same was not unconstitutional, and was not in conflict with any other act of the Legislature, and was in all respects operative and binding, would be construing a State statute and State laws, and its construction will be accepted in this court. Of course, everywhere it is stated by counsel that everything done or said by the State of Oklahoma, or its officers, or its courts, is unconstitutional and in conflict with the acts of Congress. But we take it that merely calling an Airdale a cur will not change the nature or temperament of the dog.

Counsel's legal conclusions in this regard are mere epithets, and at no time or place have they submitted any rule that would appeal to any reasonable mind; and we again repeat that no Federal question is reasonably presented and the appeal ought to be dismissed. We have repeated this expression probably too often, but almost every page of counsel's brief finally returns to

the construction of a State law, and shows they are merely trying to get this court to review the decision of the Supreme Court of the State in the interpretation of State laws. As a matter of fact we would have no objection. The claim of the agricultural lessee was presented in nearly every District Court of the State, and counsel were able to find only one man on the judiciary of the State who could agree with them, and the decision of that court was reversed by an unanimous opinion of the court with nine judges sitting. The statement that the Supreme Court of the State attempted to avoid an appeal to the Federal court by evasions and quibbles is wholly unwarranted, and we are surprised to find the name of some eminent lawyers signed to their brief.

Counsel in both briefs contend that the preference right is a valuable right and, therefore, a vested right. The question is rather academic in this case. A "preference right" never becomes a right until a sale is made, and even though it should be held to be a vested right, it would be a right that would only vest *at the time of the sale*. Counsel reach this conclusion by an analysis of two cases from Oklahoma, which when understood are not in point.

The case of *Noel vs. Barrett*, 18 Okla., 304, did hold that a preference right was a right of such value that it would sustain the consideration for a note. The preference right referred to, however, was one to renew a lease. The preference right to lease, being considered, was one existing at the time and gave to the holder of the lease a right to renew the existing lease,

while in the case at bar the right to purchase is one that never comes into operation *unless the property is sold*. But it must be kept clearly in mind that a *right may be valuable and yet may not be a vested right*. A vested right is defined in words and phrases as follows:

"A vested right is defined to be an important fixed right to present or future enjoyment, or where the interest does not depend on a period or an event that is uncertain."

It was said in *Richardson vs. Aiken*, 87 Ill., 138, quoting Cooley on Constitutional Limitations, 359, that a right cannot be considered as vested unless it is something more than a mere expectation and already is a title, legal or equitable.

In the case of *Steers vs. Kinsey*, 68 Ark., 360, it is said:

"A vested right, to be within the protection of the constitution against interference therewith, must be something more than a mere expectation, based upon the anticipated continuance of existing laws. It must have become a title, legal or equitable, in the present or future enjoyment of property in some way or another."

In the case of *Graham vs. Great Falls W. P. & T. Co.*, 30 Mont., 365, it is said:

"When the phrase, 'a vested right' or 'a vested interest,' is used in other relations, it may, with reasonable precision, be held to mean some right or interest in property that has become fixed or set, and is no longer open to doubt or controversy."

A doubt or condition exists when it is uncertain whether property will be sold, or whether lessee will accept or take it at the highest bid. There are many valuable rights that are not vested rights. All of our political rights are valuable but are not vested rights. A vested right as used in the constitutional construction, requires an existing present interest, and when used with reference to property, means a present existing title or interest in the property.

From the very nature of things, the preference right given by the Enabling Act, is not a vested right or property right. If it is a vested right, the lessee is the owner of an interest in the property. The statute, however, provides that it shall be offered for sale to the highest bidder, provided, however, that the lessee may offer the amount of the highest bid and shall be permitted to take the land. To say that he has an interest by reason of such a law, when it is impossible to determine whether he will be the lessee when the sale is made or whether he will be willing to pay the amount offered by the highest bidder, or whether he can pay such an amount, would be a disregard of the essential elements of a vested right. Again, he may ~~not~~ have the right, because the land may never be sold. He does not have such right except *at the time of the sale*. There is no law requiring it to be sold, so that it can never be determined whether the sale will be made, and he, therefore can have no vested interest in the property that may never be sold.

Clark vs. Frazier, 177 Pac., 589 (Okla.), is cited

by counsel and some inaccurate language is used by Commissioner Hooker in that opinion.

An examination, however, of the facts shows that the statement was not used with reference to a preference right as contended by counsel for plaintiffs in error. In this case one Mott, a school land lessee, died, leaving certain heirs. His heirs took the lease to the property in the name of one of the heirs and improved the property. The land was advertised for sale, and the heirs got together and agreed that Ella Frazier, one of their number, should attend the sale and buy in property for all the heirs. She induced the others to remain away by fraud, and attended the sale, herself, and purchased the land in her own name. It was alleged, further, that she paid for it with the property of the heirs by taking the money from the estate of Mott. *There was no question involved as to the preference right.* Under the law a trust resulted, as the consideration for the purchase was made from the money and property of the heirs. Besides, the law of constructive trust applied. Ella Frazier had by fraud kept the other heirs from attending the sale to protect their rights, and had, herself, promised that she would buy it for the use of the estate. Her fraud created a constructive trust. There was no preference right involved when the suit was brought, because the preference right had been exercised by the purchase of the property, but Hooker did use the expression that: "A holder of school land certificate, having a preference right to buy the land, has an equitable estate in the option." The school land certificate referred to was

not a lease, but was a certificate issued by the Secretary of the Board showing that a purchase had been made. A holder of such a certificate was in effect a holder of the title to the property. There is, in fact, no preference right to buy given in such a certificate, because it is a certificate that a sale has been made. The expression found later in the opinion, in which Hooker says that a preference right is in legal effect an option, is not only dictum, but is unsound. It is in no sense an option. It is not in legal effect an option. An option necessarily must be limited as to time and have many other limitations that have no application to the preference right. An option to buy is a present, existing right, while a preference right is one that may never come into operation.

At page 139 of the Sharp brief, it is suggested that the Commissioners of the Land Office were derelict in their duties by not selecting other portions of the land and segregating the same for mineral purposes. Counsel has volunteered the opinion that other sections are even richer in oils than the section involved in this action, and that it is the duty of the State officers to recover such lands. If they had discriminated the cases which they have cited, the State officers would be entirely vindicated. *If they do discover* the oil and gas value before the sale, the Commissioners must withhold the land from sale. But if they sell the land prior to such discovery, the fee passes to the purchaser and the lands cannot be recovered. All the cases which they have cited sustain this view, and only this view.

At the bottom of page 139, they have answered their haggling over the proper construction to be given to the words "known to have mineral" and "deemed to be valuable for mineral." Counsel, referring to the opinion of the court, says:

"The opinion further credits them (the Commissioners) with the power of divination, for it says, 'they were apprised of the oil values of the land.' This we think the first instance in history, and we dislike to doubt it, but we must. We think this must be credited to the enthusiasm of authorship and can hardly be assigned as error of law, as no one is apprised of oil until he finds it with the bit."

If counsel be correct in these conclusions, then no land could be segregated, because nobody could ever know that the same was valuable for oil until oil was being produced. The State would have had to have gone out and drilled a well upon every acre of its land in order to have ascertained that the same contained oil or gas. The very folly of this suggestion is its answer. The law only required them to use their best judgment—that is, to "deem" that it was valuable for oil, and upon such judgment to segregate the same.

The same error is carried forward on page 140 in the following inquiry by counsel:

"But if the Commissioners could so duly segregate from sale one tract of the granted lands on 'supposition' they could duly segregate from sale two tracts, an hundred tracts—all of it. In which case what becomes of the provision of the Ena-

bling Act granting lessees the right of purchase at the highest bid?"

Nothing would become of the provision. It would remain as it is now remaining, contingent upon the sale being ordered by the State. The State might have withheld all of its lands from sale without infringing any of the provisions of the Enabling Act.

Injunction.

At page 145 of the Sharp' Brief, and page 138 of Judge Boys' Brief, it is urged that the court erroneously issued an injunction in the case for the reason that the injunction would not be the proper remedy. It is suggested in the Sharp Brief that the injunction in Oklahoma is a preventive remedy and not an assertive one. If this is true it would be the construction of the Practice Act of Oklahoma, and we feel that we may safely assume that this court will not re-examine a decision upon the civil procedure of our State. It was, however, the fixed practice in Oklahoma that an injunction could be granted in a case of this character. It had been previously held by the Supreme Court of the State, in *Roma Oil Co. vs. Long*, *supra*, that injunction was the proper remedy.

Analysis of Boys' Brief.

Judge Boys has filed a separate brief. His theory is presented in a more connected way than that presented by the other gentlemen in this case. For this

reason, however, it is easier to answer because we can point out the weakness of each link in his chain of argument.

His theory, briefly stated, is as follows: That by the provisions of section 36 of the Act of March 3, 1891 (26 Stats. at Large, 1043), certain lands were reserved in the Territory of Oklahoma for school purposes, and it was provided that the same might be leased for a period not exceeding three years for the benefit of the school fund of the said Territory, by the Governor under regulations to be prescribed by the Secretary of the Interior. Thereafter, the Secretary of the Interior, acting under and by virtue of the provisions of this act, promulgated certain rules. Rule No. 8 provided, "in case a new lease is to be made at the end of three years, the preference should be given to the former lessee, if the Governor finds that he cultivated the land in a business-like manner, and fulfilled the terms of the lease in good faith."

On the 4th day of May, 1894, Congress by an Act (28 Stats. at Large, 71) ratified certain reservations that had been made by the President, and provided that section thirty-three in each township should be reversed for public building purposes, and should be leased under such rules and regulations as might thereafter be prescribed by the Legislature of Oklahoma Territory, but that until such legislative action, the Governor, Secretary of the Territory and Superintendent of Public Instruction, should constitute a board and lease such lands under the rules theretofore prescribed by the Secretary of the Interior.

This condition continued on until the passage of the Enabling Act by Congress. As we have shown, section 10 of the Enabling Act provided that the lands should be leased until sold under rules and regulations to be prescribed by the legislature of the State, but that until such legislative action they should be leased under the existing rules and regulations. The existing rules and regulations were the same rules that had been adopted by the Secretary of the Interior in the early formation of the Territory.

Counsel then asserts that these acts of Congress gave to the agricultural lessee the right to possession in perpetuity. He contends that if A executes a lease to B for the term of three years, with a provision that if he desires to re-lease it at the end of three years, and he can satisfy A that he has farmed the property satisfactorily, and has acted in good faith, that he will re-lease it for another term—That A loses in perpetuity his right to that land and B acquires in perpetuity the right to possess and enjoy the same.

The mere statement of this proposition shows to our minds its fallacy. Something more definite is required to effect a transfer of the legal title to the property. A has not agreed to release it at all, and may decide at the end of three years that he will not release it. B has not agreed to take it, and may not take it at the expiration of the first term, and if he desired to take it, he might be wholly unable to satisfy A that he had farmed the same satisfactorily, or acted in good faith.

Counsel attached to this preference right to release a clause giving the lessee the preference to buy if the same is sold, and thereupon asserts that the lessee became not only entitled to enjoy the possession in perpetuity, but vested with the legal title to the property, which he thinks ought to be quieted by the judgment of this court. He apparently overlooks that even the "existing rules," were changed because the same authority that attempted to make the "existing rules" the law, provided that they should only continue until such time as the legislature should otherwise prescribe.

On pages 76 and 77 of his brief, counsel gives two sections of two different statutes passed on the 26th day of May, 1908, showing that the Legislature had at one time prescribed different rules. At page 76 he quotes from the act of 1907 and 1908, passed May 26, 1908, which expressly stated that mineral lands should be segregated and reserved from sale until the year 1915, and for such additional period of time as may be determined by law. He also quotes from the Segregation Act showing that it had been determined by law to segregate the same from sale, lease, or other alienation without any restriction as to time. The two acts passed the same day relate to different subjects and therefore will not be held to conflict.

At page 86, he suggests that the words in section 8 of the Enabling Act, prohibiting the sale of any of the lands where same are valuable for minerals, denoted that it must, at the time of the passage of the act, have been known to be valuable for

minerals, or such lands were not withheld. He reaches the conclusion by insisting that any other construction would destroy the preference right provision of the Enabling Act. The preference right was, however, only the right to purchase at the highest bid at the time of the sale, and if certain lands were designated under a law prohibiting the sale, then the preference right was not destroyed; but it never came into existence. The Enabling Act itself expressly stated that until the lands were sold no preference right of purchase could be operative.

Counsel is certainly right in his conclusion that the mineral clause found in paragraph 8 of the Enabling Act only extended to the period ending January 1, 1915, and the State after that time had the right of sale whether mineral or not. This is true, and exactly what the act says, but the State also had the right not to sell after January 1, 1915, and long prior to that date exercised its option not to sell by the passage of the segregation law.

Counsel says, at page 90, could it be said that the preference right to buy land, and all of it, including the mineral, was first in Price; then, perhaps, ten years afterwards, by reason of some local oil flurry, etc., a lease could be sold, and that during such time Price would be deprived of his preference right, but when the flurry was over, Price would again have such right, and this could be extended indefinitely. Counsel is exactly right. Price never had any preference right until the sale was made and the high bid received. If

ten or twenty years after an oil flurry had subsided, or the oil had been removed from the premises, Price might have the preference right to buy, if he was at the time the agricultural lessee in possession.

Counsel then discusses the necessity of knowing that the land was valuable for minerals before the segregation, and he cites the same cases which we have reviewed in the brief by Sharp, stating the rule that if the land is sold and legal title passes, the grantee takes both the surface and the minerals. In those same cases we have shown it is held, that if the land is not sold neither the surface nor mineral passes, and in the case at bar the surface was not sold.

We are not admitting, though it is immaterial to this case, that the Legislature was required to lease the land at all. The Legislature might have selected one of these sections and built on it their State capitol or other public buildings. The land would have been devoted to the purpose which Congress required, and the act of the Legislature in selecting and designating such tract would have been the rules and regulations referred to in the act of Congress, and have thereby presented any lessee having any right to ever buy the land if same was sold.

The whole claim of the agriculture lessee is such fine cobweb, when measured by legal principles, that we are certain that no decree can ever be entered giving title to such lessee until the State shall have sold the same, received the high bid, and

the lessee has elected to take the same at the high bid.

At page 107 Mr. Boys has suggested, though perhaps he does not definitely state it, that the Commissioners of the Land Office approved the appraisalment and thereby exercised their power of declaring the land mineral because the appraisalment showed it was not mineral. Counsel's quotation from the appraisalment is so incomplete as to give a false impression. He quotes the questions and answers numbered 9 and 10, which are found on page 140 of the printed record. He should have quoted 8 to have made the matter referred to intelligent. Question 8 in the appraisalment reads as follows:

"Have stone quarries, sand or cement beds been opened?"

The answer was:

"No."

It was followed then by questions 9 and 10, which counsel quotes, and which reads as follows:

"9. Any gypsum, cement, salt, mineral, gas or oil? No."

"10. Is land adjacent to mineral, gas or oil production? No."

It is obvious that there is no verb in question 9, and being a part of question 8, we would look to it to obtain the verb. Then question 9, in effect, inquires:

"Has any gypsum, cement, salt, mineral, gas or oil bed been opened?"

And section 10 asks if the land is adjacent to open beds or production.

The appraisers were merely sent out under the law to view the lands, and they reported what they found upon the surface of the land. They reported the amount of land in cultivation; how same was situated with reference to hills, rivers, timber or prairie; how much of the land was stony; what buildings had been erected upon it, and how much land placed in cultivation, and the distance to markets, public roads and railroads. They were not expected to make geological investigations, and not required to make a geological report, and the Commissioner approved the report but not the facts stated in the report. The Commissioners had no way of determining whether the report was true or false except that from the location of the property and its general description they might be able to fix the valuation of the same.

This construction is obviously correct, because the land was reappraised at \$2,500 on the 30th day of August, 1915, although the Commissioners had previously, on the 20th of August, 1915, segregated the same because it was valuable for oil and gas. The Commissioners obviously did not understand that because the appraisement disclosed that there was no oil production upon the property, that they were without power to make the segregation. We have shown that the Legislature did not intend that the

exercise of the power should divest the Commissioners of any further power of segregation because they pass another act in 1917, conferring upon the Commissioners the power to segregate the oil and gas land. If counsel is right that the segregation could only have been made as of the time of the passage of the Enabling Act, and the Commissioners had lost their power to segregate by the approval of the appraisements, the later law would have been useless.

Counsel in both briefs have discussed the question of whether or not the Commissioners of the Land Office could by contract limit the rights of Price. The Commissioners of the Land Office could not limit Price's right except so far as such limitations were imposed or authorized by the Legislature, but the Legislature, in the Segregation Act, had expressly authorized the Commissioners to lease ~~only~~ the surface, and to reserve the right to mineral, and the right of ingress and egress to mine and remove the mineral. This Segregation Act gave him no right to renew his lease. True, Price was not required to join in the execution of a lease for the surface only. He could vacate the land, and under the other laws of the State, have removed his improvements, but whether he did so or not, the rules and regulations so prescribed by the Legislature gave no right to any renewal of his lease, and the Land Department properly struck out of the surface form of lease the provision giving him the right to release the land.

It is very difficult, of course, to follow counsel

in his contention that the Segregation Act, or the action of the Commissioners in segregating the land, impaired any contract. The Legislature was permitted to pass rules and regulations governing the leasing, and they provided, among one of the rules, that if the same were deemed valuable for oil and gas, that it should be leased under the special provisions of that act. How any contract then could be impaired we are incapable of understanding.

Mr. Boys, however, suggests that the Act of 1909 repealed these statutes. He says, at page 109, that:

"The Act of 1909 created the contractual relation between the defendant Price and the State, and any subsequent legislation could not affect their right, and would impair the obligation of contract."

As there was no subsequent legislation, no contract would be impaired. The legislation which he is referring to had been previously passed, and under those regulations the State had permanently withheld from sale mineral lands, which included the land involved in this action.

Mr. Boys then discussed at some length the proposition that an oil and gas lease gives an interest in real estate, but that is too far afield for us to go. It matters not whether an oil and gas lease gives an interest in the fee or not, so far as Price is concerned. The State owned the land and could give an oil and gas lease, whatever interest it may have carried, and Price,

who did not own the land and no interest in the land, and whose possession could be terminated at any time, could not complain of the action of the State in giving such lease.

Mr. Boys is a little more astute in presenting the questions which we have argued, referring to the right of the Legislature to delegate legislative power to the Board. He evidently recognized that that was a State question that could not be presented to this court, but he suggests that such delegation violated the provisions of the Enabling Act. He, however, has not presented that phase of the question at all, but has merely presented the question whether or not under the constitutions of the several States can legislative functions be delegated. We think the legislative functions cannot be delegated, but we have shown that the Legislature, having expressly prohibited the sale of the land, when a board investigates and determines that same are valuable for minerals, it is not a delegation of legislative power.

Counsel, commencing at page 140, has reviewed the case of *Frisbie vs. Whitney*, 9 Wall., 187, and also the case of *Hutchings vs. Low*, 15 Wall., 77, known as the Yosemite Valley case. His attempt to show that these decisions, holding that a preference right is not a vested right, in fact is not a right against the Government at all, but merely a right to be preferred to other purchasers, are not in point in this case. He again cites *Lytle vs. Arkansas*, 9 Howard, 314. However, the principle of *Lytle vs. Arkansas*, *supra*, is fully

explained in *Hutchins vs. Low, supra*, and we cannot see how its application can be misapplied.

Supreme Court Decisions.

Counsel in both briefs discuss the opinion of the Supreme Court, and both seem to think that the court overlooked their arguments. An examination of the opinion by the Supreme Court discloses that every question here presented was decided, although not stated in detail. The court held expressly that under the rules adopted by the Secretary of the Interior, the right to re-lease was subject to the power of the State to make other disposition of the land. In fact, other disposition was the exercise of the conditions stated in the rule, which stated that in case the land was leased, the lessee might renew his lease; that the court further held that the State segregated the land and thereby elected not to lease the same, but provided that the surface might be leased subject to entirely different conditions. The conditions were that the tenant should be paid for the improvements that were injured by the mining lessee, and as the land was withheld from sale, he had no preference right to buy, or his preference right to buy did not come into operation. The court further held that the State, being the owner, had the right to lease its land for mining purposes, and had leased this land under its power to the Magnolia Petroleum Co., and that the Magnolia Petroleum Co. was entitled to enter upon the premises, develop and operate the same for oil and gas, and was required to pay to the State the royalty exacted by its lease,

and enjoined Price from interfering with the exercise of those rights.

We think that after a full investigation of this question it will appear that counsel are complaining primarily about the action of the State in the passage of laws which they think were not beneficial to Price, and also complain of the construction of such laws by the Supreme Court of the State. No right of Price at any time had been prejudiced or disregarded. Price never had any right to this land. He had the mere right of re-leasing the same if the State desired to re-lease it, and if he satisfied the State that he was a proper tenant. The State, however, decided not to lease it generally, but to only lease the surface, restricted so as not to interfere with the production of oil or gas. Price accepted this condition and entered into a new lease in which he expressly stipulated that he was not interested in any of the minerals, would not interfere with such mineral rights, and was leasing the same solely for the purpose of agriculture. The State, exercising its right of ownership, then advertised and sold a mining lease upon the land. Counsel contended that the State had no right to sell a mining lease because it had passed an act authorizing the sale of certain lands, and that the provision with reference to the mining lease was thereby repealed. That, however, cannot be a Federal question and cannot be reviewed in this court. But if the same is reviewed, the same conclusion will be reached, in our judgment, that was reached by the lower court.

It seems to us that the cardinal principle to be

applied is that the State owned the land subject to some slight limitations, and in exercise of its rights of ownership, leased it for oil and gas, and its surface for agricultural purposes. Every landowner has this right. Price can only become the owner of this land, if he is the agricultural lessee at the time of the sale, by taking the land at the highest bid, but that can never occur until a sale has been made.

When counsel agree that the act of Congress did not direct a sale but lodged with the State the right to either hold or sell, they must then look to the laws of the State to determine Price's right, and when we look to such laws, we accept the construction given those laws by the highest court of that State, and measure the lessee's rights by such laws.

It seems to us absolutely frivolous to say that the right of one man to buy a piece of land is impaired by an act of the Legislature passed a year previous to his acquiring such right; that is, that a contract can be impaired by the act of a Legislature passed before making the contract. We understand the law to be that the laws enter into and become a part of the contract, and whatever right Price had will be governed by the existing laws.

We therefore respectfully submit that this cause ought to be dismissed and the judgment of the court below affirmed.

GEORGE F. SHORT,
Attorney General

C. W. KING,
Assistant Attorney General.

GEORGE E. MERRITT,
Attorney for Commissioners.

W. H. FRANCIS,
B. B. BLAKENEY,
HUBERT AMBRISTER,
Attorneys for Magnolia Petroleum Co.